

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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AARON L. HARTMAN,	:	CIVIL ACTION NO. 09-5028
Plaintiff	:	
	:	
v.	:	Philadelphia, Pennsylvania
	:	March 8, 2010
NATIONAL BOARD OF MEDICAL	:	8:38 o'clock a.m.
EXAMINERS,	:	
Defendant	:	
.	:	

PRELIMINARY INJUNCTION HEARING - DAY 5
BEFORE THE HONORABLE LOUIS H. POLLAK
UNITED STATES DISTRICT COURT JUDGE

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APPEARANCES:

For the Plaintiff:	CHARLES WEINER, ESQUIRE Law Offices of Charles Weiner 179 North Broad Street Doylestown, PA 18901
For the Defendant:	JANE E. LEOPOLD-LEVENTHAL, ESQUIRE Eastburn & Gray PC 60 E. Court Street P.O. Box 1389 Doylestown, PA 18909-0137

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1 (The following occurred in open court at 8:38
2 o'clock a.m.)

3 THE CLERK: All rise.

4 THE COURT: Good morning.

5 ALL: Good morning, your Honor.

6 THE COURT: Please sit down. So, I congratulate us
7 all for getting here promptly. A few minutes after 9:00, I'm
8 going to have to recess for a few minutes for a phone that
9 has to be made. But it will not be a long, anything lengthy.

10 So, I take it, we are continuing with the
11 examination, I guess.

12 MS. LEOPOLD-LEVENTHAL: I didn't know whether you
13 wanted me to call her up.

14 THE COURT: Sure.

15 MS. LEOPOLD-LEVENTHAL: We have Dr. Farmer and then
16 Dr. Clauser and that would be the end of defendant's case.

17 THE COURT: Well, I'm glad to see Dr. Farmer again
18 today.

19 THE WITNESS: Good morning, your Honor.

20 (Pause.)

21 THE COURT: I was thinking, Dr. Farmer, as I thought
22 back to your curriculum vitae as briefly summarized at the
23 beginning of your testimony. I thought, my goodness, we have
24 a witness who is more educated in more different disciplines
25 than one often sees. That's very impressive.

1 THE WITNESS: Thank you, your Honor. Just a late
2 bloomer.

3 DIRECT EXAMINATION

4 BY MS. LEOPOLD-LEVENTHAL:

5 Q Good morning, Dr. Farmer. Where we left off on Friday,
6 you had just testified with respect to the NBME's letter to
7 Mr. Hartman of September 29, 2009, granting him double times
8 and accommodations and then we had marked the scheduling
9 permit that was -- identified the eligibility period for that
10 double time as from September 28, 2009 through September 28,
11 2010. After the NBME forwarded the information to Mr.
12 Hartman approving the double-time accommodation, did Mr.
13 Hartman then write to Elizabeth Azari, an attorney for NBME?

14 A At some point, at some point, he did, yes.

15 Q Okay, would you take a look at Exhibit Tab 16 in the
16 defendant's book?

17 A I have that.

18 Q And is this the letter that Mr. Hartman wrote to Ms.
19 Azari on October 5, 2009?

20 A It appears to be, yes.

21 MS. LEOPOLD-LEVENTHAL: I'd like to mark the
22 document at Exhibit Tab 16 as Defendant's Exhibit 22.
23 Although, I do believe that plaintiff may have introduced the
24 same letter in his case in chief. And I'd like to move this
25 into evidence, at this time.

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1 THE COURT: Fine.

2 (Defendant's Exhibit 22 admitted in evidence.)

3 Q If you would, Dr. Farmer, please take a look at the first
4 sentence in the second paragraph. Did Mr. Hartman request
5 that he be permitted to take the Step II CS test without any
6 oral communication, in that letter?

7 A That's how it appears to me.

8 Q Was there anything in Mr. Hartman's letter to suggest
9 that he wanted to utilize that particular device either as a
10 supplement or intermittently throughout the examination?

11 A Nothing explicitly, no.

12 Q Okay. And ten days later, did you then receive a letter
13 from Mr. Hartman's attorney, Charles Weiner?

14 A I'm not sure of the date, but yes, a letter came.

15 Q Take a look at Exhibit 17, which is the next exhibit in
16 the binder.

17 A Yes, this is the letter from Mr. Weiner.

18 Q What's the date on that letter?

19 A October 16, 2009.

20 Q Do you believe that's a true and correct copy of the
21 original letter that Mr. Weiner sent to the NBME Shelly Green
22 on October 16, '09?

23 A I do.

24 MS. LEOPOLD-LEVENTHAL: I'd like to mark Defendant's
25 Exhibit Tab 17 as Defendant's Exhibit 23 and move it into

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1 evidence, at this time.

2 THE COURT: All right.

3 (Defense Exhibit 23 admitted in evidence.)

4 Q Dr. Farmer, what did Mr. Weiner request of the NBME in
5 his October 16th letter?

6 A I believe on the second page, the third paragraph from
7 the bottom, he's requesting additional time and use of
8 assistive technology, such as Text To Speech (ph), "Text To
9 Speech software would enable Mr. Hartman to communicate
10 directly from a laptop computer, by typing text, which would
11 then verbalize the typed text."

12 Q Was that request different than what Mr. Hartman
13 communicated to the NBME just 11 days earlier with respect to
14 the orator request?

15 A I think it was different in terms of the mode. This
16 would be a mechanical orator, the computer, rather than a
17 human orator.

18 Q Was that the first time that anyone, on behalf of Mr.
19 Hartman, had suggested use of the Text To Speech device?

20 A As far as I know, yes.

21 Q Okay. And did Mr. Weiner, in his letter, suggest that
22 the Text To Speech device would be the sole source of Mr.
23 Hartman's communication during the standardized patient
24 encounter?

25 MR. WEINER: Objection, the letter speaks for

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1 itself, your Honor.

2 THE COURT: I'm sorry, I didn't get the objection.

3 MR. WEINER: The letter is a written document, it
4 speaks for itself in terms of what I've requested.

5 THE COURT: Sustained.

6 BY MS. LEOPOLD-LEVENTHAL:

7 Q What did you understand Mr. Hartman was requesting on
8 behalf -- or I'm sorry -- Mr. Weiner was requesting on behalf
9 of Mr. Hartman pursuant to the October 16th letter?

10 A My read of the letter was that instead of a human orator,
11 the use of Text To Speech was the request.

12 Q Did Mr. Weiner include anything in his letter that a Text
13 To Speech device would be used as a supplement?

14 A No, he did not.

15 Q Did he indicate in his letter that a Text To Speech
16 device would be used alternatively or intermittently with
17 oral communication?

18 A No, he did not.

19 Q Did Mr. Weiner support that request for the Text To
20 Speech devise with any documentation or written information?

21 A Not that I recall.

22 Q Now, the NBME granted Mr. Hartman double time on the Step
23 II CS, correct?

24 A Double time over two days, yes.

25 Q Okay. And do you believe, on behalf of the NBME, that

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1 granting double time to Mr. Hartman on this exam was an
2 appropriate accommodation?

3 A I do.

4 Q And why is that?

5 A All of the documentation that had been provided by Mr.
6 Hartman or on his behalf, indicated that time was the only
7 accommodation he had ever used in the past. I believe that
8 he had sent information from the school that they had
9 provided only time for oral examinations.

10 Q Did the fact that Mr. Hartman had passed the spoken
11 English proficiency portion of the Step II CS exam factor
12 into your decision, at all?

13 A I think it was one more piece of information that was now
14 available to us, that indicated that he could speak and be
15 understood by others.

16 Q In October, did you, on behalf of the NBME, review and
17 also consider Mr. Hartman's request for use of the Text To
18 Speech device?

19 A I did.

20 Q Okay. And did the NBME ultimately deny that request?

21 A That's correct, it was denied.

22 Q Would you take a look at Exhibit 18 in the binder in
23 front of you, please?

24 A I have that.

25 Q And this is a letter from you, dated October 27, 2009, to

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1 Mr. Hartman, correct?

2 A That's correct.

3 Q Is this a true and correct copy, to the best of your
4 knowledge, of the original letter that you sent to Mr.
5 Hartman?

6 A It is.

7 MS. LEOPOLD-LEVENTHAL: I would like to mark Tab 18,
8 Dr. Farmer's October 27th letter, as Defendant's Exhibit 24
9 and move that into evidence, at this time.

10 THE COURT: Surely.

11 (Defense Exhibit 24 admitted in evidence.)

12 Q Dr. Farmer, why did the NBME deny, in that letter, Mr.
13 Hartman's request to use the Text To Speech device on the
14 Step II CS exam?

15 A I think for the reasons I indicated in the last couple of
16 questions, that the documentation he had provided indicated
17 that time was the only accommodation that he had ever
18 requested, ever utilized. There is no indication to support
19 the Text To Speech accommodation.

20 Q There has been some discussion about the date of the Step
21 II examination, CK and the Step II CS examination. Do you
22 understand that Mr. Hartman took those examinations the same
23 week, correct?

24 A That's my understanding.

25 Q And Mr. Hartman failed the Step I examination the first

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1 time he took it, is that correct?

2 A That's my understanding.

3 Q What is the percentage pass rater for first-time takers
4 of the Step I examination?

5 A Step I for first-time takers -- students and graduates of
6 schools that give the MD degree, in 2008 it was 94 percent --

7 Q Thank you.

8 A -- pass rate.

9 Q Dr. Farmer, did you prepare a declaration on behalf of
10 the NBME, as related to the Hartman case?

11 A Yes.

12 Q Please turn to Exhibit 34 in the exhibit binder in front
13 of you.

14 A I have that.

15 Q And is that the declaration that you prepared in this
16 case?

17 A It is.

18 Q Sitting here today, Dr. Farmer, is everything set forth
19 in your declaration, true and correct to the best of your
20 knowledge today?

21 A It is.

22 MS. LEOPOLD-LEVENTHAL: I would like to mark Dr.
23 Farmer's declaration, at Exhibit Tab 34, as Defendant's
24 Exhibit 25 and move that into evidence, at this time.

25 THE COURT: All right.

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1 (Defense Exhibit 25 admitted in evidence.)

2 Q Dr. Farmer, have you ever reviewed a request from other
3 applicants seeking accommodations under the ADA for speech
4 disfluency when taking the Step II CS exam?

5 A I have, yes.

6 Q About how many times, if you're able to estimate?

7 A That I reviewed personally?

8 Q Yes.

9 A Probably less than a half a dozen.

10 Q In each instance, what accommodation has the NBME granted
11 to those applicants with a speech disfluency?

12 A Some amount of additional time on the patient encounter.

13 Q And it's fair to say that the NBME has never permitted a
14 test taker to utilize either an orator or a Text To Speech
15 device when that applicant or any applicant on the Step II CS
16 examination?

17 A That's correct.

18 Q And is it your understanding that with the granting of
19 additional time, all of the applicants with a speech
20 disfluency passed the Step II CS examination?

21 A That's my understanding, as best I can recall.

22 Q Does granting additional time to a test taker on the Step
23 II CS exam, constitute a fundamental alteration of the skills
24 that are assessed on that exam?

25 A I don't believe so, no.

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1 Q And why not?

2 A I think time is not a construct being measured and I'll
3 qualify that. My understanding is the Step II CS
4 examination, the clinical skills exam, is meant to simulate a
5 real-life encounter. So, I believe that the staff and the
6 physician committee members, who have developed the scoring
7 of the exam, have indicated that some amount of additional
8 time is allowable for the clinical skills examination. But
9 after a certain amount, the concern is that it might actually
10 no longer simulate real life or a real-life encounter.

11 Q You understand that a hearing-impaired applicant applied
12 for accommodations on Step II CS, correct?

13 A That's correct.

14 Q And what accommodation did the NBME grant to that
15 individual?

16 A A specific hearing-impaired individual?

17 Q Yes.

18 A Hearing-impaired individuals request --

19 Q No, what did that particular applicant, what did the NBME
20 grant them, I'm sorry, as an accommodation?

21 A There was one individual who was granted a two-way sign
22 language interpreter.

23 Q And did that individual take the Step II CS exam two
24 times?

25 A They did, yes.

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1 Q And were you employed with the NBME, at that time?

2 A I believe I was employed.

3 Q Did you hold the position that you have now, Doctor?

4 A For the second administration, I did.

5 Q Okay.

6 THE COURT: Could I interject --

7 MS. LEOPOLD-LEVENTHAL: Sure.

8 THE COURT: -- you said a two-way sign language
9 interpreter, as I understood it.

10 THE WITNESS: Correct.

11 THE COURT: Could you unpack that and describe what
12 process we're talking about?

13 THE WITNESS: Certainly, your Honor. A one-way sign
14 language interpreter would interpret what the individual who
15 is speaking, is saying. So, they would sign that information
16 to the deaf individual. With a two-way sign language
17 interpreter, the individual speaking would have their spoken
18 words sign language interpreted to the deaf individual. The
19 deaf individual, who doesn't speak, would then sign back to
20 the sign language interpreter and the interpreter would speak
21 those words to the other individual in the dyad.

22 THE COURT: I want to be sure that I understand
23 which individual is which. The person being tested, are we
24 talking about the person being tested as hearing impaired or
25 are we talking about the person being interviewed as hearing

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1 impaired or are we talking about both?

2 THE WITNESS: Let's call the examinee and the SP or
3 the patient. The examinee is hearing impaired, the SP is
4 not. The SP is speaking, the hearing impaired individual
5 can't hear that, so the interpreter signs that information to
6 the examinee. The examinee who is hearing impaired, who
7 doesn't speak, signs what they want to say to the patient, to
8 the sign language interpreter. The interpreter then speaks
9 those words to the patient.

10 THE COURT: I see.

11 Q Did that individual receive a score on the spoken English
12 proficiency portion of the exam?

13 MR. WEINER: Objection, foundation.

14 THE COURT: Well, if you want to ask a couple of
15 questions to go to the witness' foundation, if any.

16 MS. LEOPOLD-LEVENTHAL: I think I have. She's been
17 an employee in this position for several years.

18 BY MS. LEOPOLD-LEVENTHAL:

19 Q But do you know -- are you familiar with that
20 individual's score on the examination?

21 A I am.

22 Q Do you know whether or not that individual was scored on
23 the spoken English proficiency portion of the exam?

24 A My understanding is that the accommodation provided for
25 her hearing impairment, would not allow the measurement of

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1 spoken English proficiency.

2 Q Have there been disabled individuals --

3 THE COURT: I'm not sure -- I thought the question
4 was how it was scored, maybe I'm wrong.

5 MS. LEOPOLD-LEVENTHAL: My question was, was that
6 person given a score on the spoken English proficiency
7 sub-component of the exam.

8 THE WITNESS: No, the person was not given a score
9 and because the person did not speak, spoken English could
10 not be measured. So, no score was provided for the spoken
11 English proficiency sub-section. The other two sections were
12 scored, however.

13 THE COURT: And these, to your knowledge, was the
14 result reported as a failure or as a pass?

15 THE WITNESS: I don't know, your Honor. I don't
16 know how it was reported. I don't know how the overall was
17 reported. I know each sub-section then would have been
18 reported.

19 MS. LEOPOLD-LEVENTHAL: I believe the next witness,
20 Dr. Clauser, will be able to address that question.

21 THE COURT: All right.

22 Q Finally, Dr. Farmer, have there been disabled individuals
23 who have been granted accommodations for a disability on the
24 medical licensing examination, whose particular disability
25 either waxes or wanes at a particular point in time?

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1 A Yes.

2 Q Would you give us a couple examples of situations where
3 that has occurred?

4 A Individuals with multiple sclerosis have remitting,
5 relapsing conditions, sometimes where they need an
6 accommodation for one exam but not for the next exam.
7 Individuals with migraine headaches often say that it's
8 exacerbated with stress. And those individuals sometimes
9 will need an accommodation for some exams, but not for
10 others.

11 Q And what is, if there is one, does the NBME have a view
12 or a position with respect to when that disabled individual
13 should address the examination, that is, when they are in a
14 waxing or when they are in a waning period or do you provide
15 any sort of advice, at all, on that issue?

16 A Well, we ask examinees to provide us information about
17 their current functioning. However, if they are planning to
18 take the test three or six months in advance, they don't
19 always know how they're going to be. We do have individuals
20 who have withdrawn from the exam or delayed their exam
21 because at the time that they were scheduled, their symptoms,
22 you know, were, you know, perhaps, more difficult for them,
23 at that time. And they waited until their symptoms abated.

24 Q Thank you.

25 MS. LEOPOLD-LEVENTHAL: No further questions.

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1 THE COURT: All right.

2 (Pause.)

3 CROSS-EXAMINATION

4 BY MR. WEINER:

5 Q Good morning, Dr. Farmer.

6 A Good morning, Mr. Weiner, how are you feeling today?

7 Q I'm feeling much better, thank you very much. The
8 weekend helped improve me. Dr. Farmer, I'd like you to turn
9 to Tab 33 in plaintiff's binder. And these were defendant's
10 supplemental answers to plaintiff's interrogatories, is that
11 accurate?

12 A It could be, hang on a second. I don't know that I
13 actually saw these.

14 Q Okay.

15 (Pause.)

16 A Yes, that's what it appears to be.

17 Q And you assisted in providing the answers to the
18 supplemental interrogatories --

19 A Yes.

20 Q -- is that correct?

21 A Yes.

22 Q And in looking at that chart, there is an individual who
23 was granted a two-way signing interpreter on December 29,
24 2005?

25 A I see that.

Farmer - Cross

17

1 Q Is that correct. And then there is an individual who was
2 granted, on February 8, 2007, two-way signing for the Step II
3 CS, is that correct?

4 A That's correct.

5 Q And is it your testimony that was the same person?

6 A It is.

7 Q And that person was graded on the CIS sub-component of
8 the CS II examination?

9 A That's my understanding.

10 Q And that individual was graded on the ICE sub-component
11 of the Step II?

12 A That's my understanding.

13 Q So, it was only the SEP, where the NBME had taken the
14 position that an individual who cannot speak during the
15 examination, that that particular accommodation of two-way
16 sign would fundamentally alter the examination?

17 A It's my understanding that the position taken by the
18 board was that the individual's accommodation of a two-way
19 sign language interpreter precluded the measurement of the
20 individual's spoken English proficiency. That's how I
21 understand it.

22 Q But it did not preclude the measurement of either the CIS
23 component, correct?

24 A Not to my knowledge.

25 Q And it did preclude the measurement of the ICE

1 sub-component, is that correct?

2 A Not to my knowledge.

3 Q And with use of the two-way sign, the individual who was
4 taking the exam was unable to speak at all, is that correct?

5 A Again, I don't know much about the individual, other than
6 they requested a two-way sign language interpreter.

7 Q Is it your understanding that they -- did they speak at
8 all, to your knowledge during that examination?

9 A Again, the first pre-dated me. Again, I'm aware of what
10 accommodations were provided.

11 THE COURT: Excuse me, when you say the first one
12 pre-dated you, you mean the 12/29/2005?

13 THE WITNESS: That's correct. Your Honor, while I
14 was doing my post-graduate training, I was part time. So, I
15 was not in this position of making a decision.

16 THE COURT: Right, I just wanted to be sure that I
17 understood that.

18 THE WITNESS: Oh, I'm sorry.

19 THE COURT: We're not talking about first person who
20 was different from a second person. The same person, we
21 understand, was examined in 2005 and 2007.

22 THE WITNESS: That's correct.

23 THE COURT: And you were unfamiliar with the 2005
24 situation.

25 THE WITNESS: That's correct.

1 THE COURT: Sorry, you can go ahead.

2 MR. WEINER: That's fine, your Honor.

3 Q Mr. Hartman has demonstrated that he is a person with a
4 disability, is that correct?

5 A I believe so, yes.

6 Q And Mr. Hartman has demonstrated to your satisfaction
7 that he's a person who's functionally impaired in his ability
8 to speak and communicate, is that correct?

9 A I believe he's demonstrated that his stutter rises to the
10 level of a disability under the ADA.

11 Q And NBME has denied Mr. Hartman's request to utilize Text
12 To Speech on Step II CS examination, is that correct?

13 A That's correct.

14 Q As the Manager of Disability Services Office for NBME,
15 you're the person who makes the decisions whether or not to
16 deny or grant accommodations on the Step II CS, is that
17 correct?

18 A That's correct.

19 Q Even the other employees who work under you do not make
20 that determination, is that correct?

21 A That's correct.

22 Q The final decision of whether or not to grant
23 accommodations lies with you, is that correct?

24 A Correct.

25 Q And even when you seek the assistance of an outside

1 consultant or an outside expert, it is not the outside
2 consultant or expert who makes that decision, is that
3 correct?

4 A That's correct.

5 Q It is you who makes that decision, correct?

6 A Correct.

7 Q You may rely upon the outside consultant to give you
8 advice, but you are the one who makes that decision, is that
9 correct?

10 A Still correct, yes.

11 Q You're not a speech pathologist, is that correct?

12 A Correct.

13 Q And you're not trained to provide speech therapy, is that
14 correct?

15 A Correct.

16 THE COURT: You've undercut what I said at the said
17 at the start of this morning's session. Maybe you've
18 identified the one discipline that the witness doesn't have.

19 MR. WEINER: And I thought I would expose that, your
20 Honor.

21 Q And it's true that you have not made any arrangements to
22 have Mr. Hartman evaluated yourself, by any expert, is that
23 correct?

24 A Correct.

25 Q Mr. Hartman actually has made an offer to make himself

1 available to be evaluated by NBME, is that correct?

2 A Yes.

3 Q And the NBME did not take him up on that offer, is that
4 correct?

5 A That's correct.

6 Q And you have not evaluated Mr. Hartman in terms of his
7 use of Text To Speech, is that correct?

8 A I have not evaluated him, no.

9 Q And other than, maybe, your appearance in this courtroom,
10 you had never observed Mr. Hartman utilize Text To Speech is
11 that correct?

12 A Correct.

13 Q When Mr. Hartman had submitted his initial request for
14 accommodations on the Step II CS, that was in July of 2008?

15 A Yes, that's correct.

16 Q And he requested double time for each patient encounter,
17 at that time, correct?

18 A He did, yes.

19 Q And his application included a report from a speech
20 pathologist, is that correct?

21 A It did, yes.

22 Q And that was -- the report was from a Leslie Oldemeir
23 (ph) and that report was dated in 2007, is that correct?

24 A That's my recollection, yes.

25 Q Now, you had testified --

Farmer - Cross

22

1 THE COURT: I'm sorry, what date? You've just asked
2 it, I'm not sure which date it was that this request was.

3 MR. WEINER: The request was in July of 2008, your
4 Honor.

5 THE COURT: And that's your understanding?

6 THE WITNESS: That's correct, your Honor.

7 THE COURT: Okay.

8 Q And the report that was provided was in 2007?

9 A I believe it was May of 2007, yes.

10 Q And you had sent Mr. Hartman's request for
11 accommodations, at that time, to an outside consultant, is
12 that correct?

13 A Correct.

14 Q And you very rarely make decisions about accommodations
15 without first sending it to an outside consultant, is that
16 correct?

17 A That's a fair statement, yes.

18 Q And in this case, the outside consultant to whom you sent
19 Mr. Hartman's request to, was a Dr. Laura Webber, is that
20 correct?

21 A Dr. Laura Wilber.

22 Q Wilber, I'm sorry, Dr. Laura Wilber?

23 A Correct.

24 Q And Dr. Wilber did not conduct her own evaluation or
25 assessment of Mr. Hartman, is that correct?

1 A Correct.

2 Q She simply reviewed the records and provided some opinion
3 to NBME, is that correct?

4 A She reviewed everything that Mr. Hartman had submitted,
5 yes.

6 Q And is Dr. Wilber a paid consultant that NBME has used in
7 the past?

8 A Yes.

9 Q How many years has Dr. Wilber consulted with the NBME?

10 A I'm not exactly sure. I have known her since 2004. So,
11 at least, since then.

12 Q So, for approximately, five to six years, the NBME, at
13 least, under your direction, has been utilizing Dr. Wilber,
14 is that correct?

15 A Correct.

16 Q Isn't it true that Dr. Wilber's expertise is in
17 audiology?

18 A I believe she holds certifications in both
19 speech/language and in audiology.

20 Q Her certification in speech/language dates back to 1959
21 or why don't we first take a look at her CV. Can you turn to
22 her CV, located in defendant's binder? At Tab 6.

23 (Pause.)

24 Q I'll correct myself, the certification she holds dates
25 back to 1968 for speech/language, is that correct?

1 A What page are you on?

2 Q I'm looking at Tab 6, I believe it's the second page of
3 Dr. Wilber's vitae.

4 A That's correct.

5 Q And other than perhaps being a speech therapist between
6 1958 to 1961, is there any other indication she was involved
7 in speech pathology?

8 THE COURT: If you could help identify which
9 location?

10 MR. WEINER: I'm sorry, on page one of Dr. Wilber's
11 vitae, where it lists her professional employment.

12 THE COURT: All right, now, if you want to ask your
13 question again.

14 MR. WEINER: Sure.

15 Q Is the only indication that she was involved in speech
16 therapy between 1958 and 1961?

17 A I'll have to take a look through the rest of it.

18 (Pause.)

19 A Well, Mr. Weiner, it looks like that's the only date that
20 it uses the term speech therapy. But I wonder what her
21 duties might have been in some of the others, where she was a
22 professor of communication sciences, professor of
23 otolaryngology.

24 Q In terms of in looking at her CV, the vast amount of her
25 publications and written articles have all been in the area

1 of audiology, is that correct?

2 A I'll take a look.

3 (Pause.)

4 A That looks right.

5 Q And when you have referred individuals who are requesting
6 accommodations, who suffer from a hearing loss, you forward
7 those to Dr. Wilber, is that correct?

8 A That's correct.

9 Q And to your knowledge, does Dr. Wilber have a Ph.D. in
10 communicative disorders?

11 A I believe her Ph.D. is in audiology.

12 Q Okay. And to your knowledge, does Dr. Wilber have board
13 recognition in speech disfluencies?

14 A My knowledge would only be what is on the CV.

15 Q Do you see anything on your CV -- the CV in front of you
16 to indicate that she has board recognition in speech
17 disfluencies?

18 A What is board recognition?

19 Q Well, Dr. Tetnowski (ph) had testified about being board
20 recognized.

21 A I don't know what that means.

22 THE COURT: I'm sorry, you were finding a reference
23 to board --

24 MR. WEINER: Dr. Tetnowski, as part of his
25 expertise, had testified about being board recognized in

1 speech disfluency.

2 THE COURT: Oh, I'm sorry. I thought you were --
3 okay.

4 MR. WEINER: I was really asking if Dr. Wilber holds
5 any board recognition in speech disfluency.

6 THE COURT: Okay.

7 Q Is it your understanding now, that Mr. Hartman, while he
8 was in medical school, received double time on both oral
9 examinations, as well as clinical examinations?

10 A I'm sorry, could you state that question again? Double
11 time on clinical examinations?

12 Q Yes, is it your understanding that Mr. Hartman had been
13 approved for double time, while he was in medical school, for
14 both oral examinations and clinical type examinations?

15 A I believe with the Complaint that you filed with the
16 Court, there was an attachment, another copy of the
17 certification of prior test accommodations. In which Dr.
18 Chondrin (ph) indicated some amount of time that was provided
19 for oral examinations.

20 Q And just to be specific, that's if we go to plaintiff's
21 binder and look at Exhibit 2 -- I'm sorry, Tab 2. And that
22 would be located at page 6 of 11.

23 A Yes, this is the one that is dated, signed by Dr.
24 Chondrin, 8 -- looks like 30, 2008.

25 Q 2008 or 2007?

Farmer - Cross

27

1 THE COURT: Which page, I'm sorry.

2 MR. WEINER: Possibly 2008. I'm sorry, your Honor,
3 it's at page 6 of 11.

4 THE COURT: All right.

5 THE WITNESS: So, page 6 of 11 is a certification of
6 prior test accommodations that was provided, again, as an
7 attachment with the Complaint, I believe. Page 7 of 11, is
8 the certification of prior test accommodations that Mr.
9 Hartman submitted to the National Board, with his request for
10 test accommodations.

11 Q And on page 6 of 11, the certification here indicates
12 that Mr. Hartman received double time for oral examinations?

13 A I can read it. "Extended time for oral exams,
14 specifically for objective, standardized, clinical
15 examinations, Aaron was given double time to complete the
16 history and physical on a simulated patient encounter."

17 Q Would you agree that when assessing an applicant's
18 request for accommodations, they must be done on an
19 individualized basis?

20 A That's correct, yes, I'd agree with that.

21 Q And prior accommodations out of school, there's no
22 guarantee that NBME will provide those exact accommodations,
23 is that correct?

24 A That's correct.

25 Q And the rationale supports the reason for denying Mr.

1 Hartman's request in 2008 over double time and approving time
2 and a half, would that be correct?

3 A The rationale of not guaranteeing what someone gets in
4 medical school is what they'll get on the board?

5 Q Yes.

6 A Well, the rationale is that we do an independent review
7 of the documentation.

8 Q And the fact that Mr. Hartman received strictly double
9 time during medical school, two or three years ago, should
10 not likewise be binding on whatever determination you are
11 making when reviewing accommodations for the USMLE Step II,
12 is that correct?

13 A It should not be binding, no, that's correct.

14 Q I believe you mentioned you had reviewed requests for
15 accommodations by half a dozen individuals with speech
16 disorders, is that correct?

17 A I would say that the number of individuals who request
18 for test accommodations for Step II CS, on the basis of a
19 speech disorder, is probably less than a half a dozen, yes.

20 Q Yes and you're talking about since 2004, when you've been
21 reviewing these, is that correct?

22 A Since 2006.

23 Q Since 2006?

24 A When I've been reviewing.

25 Q Okay. What of the amount of different disabilities that

1 you review request for accommodations for speech disfluency
2 would make a up a small percentage, is that a fair statement?

3 A A very small, yes.

4 Q And prior to coming here to testify, did you review any
5 of these requests for accommodations presented by other
6 individuals?

7 A I believe, in answering interrogatory Number 11, I did a
8 computer search of those individuals who had been
9 accommodated. I believe the interrogatory was those who
10 received accommodations and to confirm that the individual
11 received the accommodation on the basis of the speech
12 disfluency and not some other impairment, because individuals
13 can claim multiple impairments. I looked over some of the
14 files, that's correct.

15 Q Did you review any of their reports demonstrating their,
16 the extent of their speech disfluency prior to coming her to
17 testify?

18 A In preparation for testimony?

19 Q Yes.

20 A No.

21 Q Are you able to state that -- whether or not these
22 individuals have the severity of disfluency that Mr. Hartman
23 has?

24 A Not at this moment, no.

25 Q Have you reviewed Dr. Tetnowski's report?

Farmer - Cross

30

1 A I looked at it, I believe, when the copy of the Complaint
2 and the attachments were forwarded to me from counsel.

3 THE COURT: Mr. Weiner, I think I said that I would
4 have to make a phone call.

5 MR. WEINER: Yes, your Honor.

6 THE COURT: I'm going to make it. We'll take a
7 brief recess.

8 (Court in recess 9:22 to 9:43 o'clock a.m.)

9 THE COURT: All right, we're back in business. Dr.
10 Farmer, if you want to return.

11 Q Dr. Farmer, just to reiterate, Mr. Hartman's 2008 request
12 for accommodations, his proof of disability was the 2007
13 report from Dr. Oldemeir, is that correct?

14 A That's correct.

15 Q And then you submitted that report to your consultant,
16 Dr. Wilber, is that correct?

17 A Everything that was provided by Mr. Hartman was sent to
18 Dr. Wilber, yes.

19 Q And I think we've established that Dr. Wilber has been a
20 consultant for NBME for anywhere from five to six years, is
21 that correct?

22 A At least, yes.

23 Q Is Dr. Wilber familiar with the Step II CS?

24 A Well, I'm not quite sure what you mean by familiar, but
25 we instruct the consultants on the examinations that they are

1 consulting about.

2 A Did she receive any training about the construct of this
3 Step II CS?

4 A I don't know what that we would call it the construct.
5 She would have received training about how the examination is
6 delivered, what it looks and feels like, what the examinee is
7 being asked to do.

8 Q Is she familiar with the training of the standardized
9 patients?

10 A I don't know.

11 Q Does she have any knowledge whether or not the
12 standardized patients receive any type of sensitivity
13 training?

14 A I don't know what she knows.

15 Q And in reviewing Dr. Wilber's report, which was located
16 at D-7.

17 A I see that.

18 Q Isn't it true that Dr. Wilber reported or advised to you
19 that stuttering can be misinterpreted as an inability or a
20 lack of knowledge?

21 THE COURT: That what could be, I'm sorry, I didn't
22 get your question.

23 MR. WEINER: That stuttering can be misinterpreted
24 as an inability or lack of knowledge.

25 Q Is that what Dr. Wilber reported to you?

1 A It is.

2 Q Did you request that Dr. Webber address the impact of
3 stuttering may have on standardized patients?

4 A I'm sorry, I don't understand the question.

5 Q Let me first re-word the question. Did you request that
6 Dr. Wilber address the impact that stuttering has on
7 listeners?

8 A No.

9 Q Did you request that Dr. Wilber address the impact that
10 stuttering may have on standardized patients?

11 A No.

12 Q And there was nothing in -- excuse me -- there was
13 nothing in Ms. Oldemier's report regarding the impact of
14 stuttering on listeners that Dr. Wilber was responding to, is
15 that correct?

16 A I don't have the -- Ms. Oldemeir's report in front of me.

17 Q If you turn to D-2, starting at pages 9 through 11, that
18 would be Ms. Oldemier's report.

19 A I'm sorry, which binder are we in?

20 Q We're in plaintiff's binder.

21 THE COURT: We're at page 9 of --

22 MR. WEINER: Excuse, Ms. Oldemier's report runs from
23 page 9 through page 11, of Tab 2 in plaintiff's binder.

24 THE WITNESS: And your question again was, Mr.
25 Weiner, sorry.

1 Q That there was nothing in Ms. Oldemier's report regarding
2 the impact of stuttering on listeners that Dr. Wilber was
3 responding to when she made the comments about the impact on
4 listeners.

5 A There's nothing in Ms. Oldemier's report that talks about
6 that and I'm not sure what Dr. Wilber -- that Dr. Wilber was
7 reacting to anything when she informed me of that.

8 Q And you had indicated she is familiar with the Step II
9 CS, is that correct?

10 A Yes.

11 Q Mr. Hartman's initial request for Text To Speech software
12 came by way of a letter from me to NBME's general counsel.
13 Is that your understanding?

14 A That's my understanding, yes.

15 Q And the letter was brought to your attention to review?

16 A That's right, it was forwarded to me from counsel.

17 Q And it's your testimony that at the time you reviewed
18 that letter, it was your impression that Mr. Hartman was
19 going to utilize Text To Speech on the Step II CS
20 exclusively?

21 A Mr. Hartman was, I think, specific in his request form
22 when he requested the use of an orator and to have the
23 scoring criteria changed. I believe your letter that
24 followed, asked for Text To Speech technology. And I had no
25 reason to believe that the request was anything other than

1 Mr. Hartman's request. But now a change from an orator to
2 Text To Speech.

3 Q And is it now your understanding that Mr. Hartman's
4 request for use of Text To Speech is to be intermittent on
5 the Step II CS, is that correct?

6 A I read that in the Complaint filed with the Court, yes.

7 THE COURT: I want to be sure that I understand
8 what was covered by the term, intermittent, as you used it.

9 MR. WEINER: What I --

10 THE COURT: Do you want to proceed --

11 MR. WEINER: Sure.

12 THE COURT: -- so we know what the witness is
13 responding to.

14 Q What is your understanding, based on what you've reviewed
15 or heard here in court, as to what Mr. Hartman's request is
16 concerning his use of Text To Speech on the Step II CS
17 examination?

18 A I'd have to refer back to the Complaint. Is that
19 somewhere in one of the binders?

20 Q I believe the Complaint simply says use of Text To
21 Speech. It does not state whether it's intermittent or
22 exclusive. It just refers to use of Text To Speech.

23 What I am asking you is, based on what you've become aware of
24 through your position, do you have an understanding that Mr.
25 Hartman intends to use Text To Speech intermittently?

1 A Again, I believe I read that in the Complaint, because I,
2 my sense was that things had changed once again. That the
3 request had changed from an orator to Text To Speech and then
4 in the Complaint, it was some combination of Text To Speech
5 and speaking.

6 Q All right, so, is it your understanding that Mr. Hartman
7 does intend to speak on the Step II CS examination and when
8 needed, he would utilize the Text To Speech?

9 A In all honesty, Mr. Weiner, I'm still a little confused
10 about what Mr. Hartman's intention is for the exam.

11 Q Were you here during his entire testimony?

12 A No.

13 Q Okay. And is there anything in the letter that I had
14 presented to Ms. Green, requesting use of Text To Speech on a
15 Step II CS, which requested Mr. Hartman's score be -- that
16 Mr. Hartman's examination would be scored any differently?

17 A I believe you were silent on that issue, yes.

18 Q Now, you were aware that Dr. Tetnowski's report was
19 provided to NBME, NBME's counsel in mid-December, is that
20 correct?

21 A Again, I believe it was an attachment to the Complaint,
22 was that in December?

23 Q Well, it wasn't an attachment to the Complaint, it came
24 after the Complaint, which was in mid-December.

25 A I'm aware that Dr. Tetnowski's evaluation came to general

1 counsel, at some time, yes.

2 Q And did you see the report, at that time?

3 A I did look at it, yes.

4 Q And at the time of your deposition, which was in January,
5 on January 29th, you had not been asked by anyone at NBME to
6 review Mr. Hartman's request for accommodations in light of
7 Dr. Tetnowski's report, is that correct?

8 A That's correct.

9 Q Has that changed today?

10 A No.

11 Q So, you have not referred Dr. Tetnowski's report to an
12 outside consultant, is that correct?

13 A That's correct.

14 Q And you have not asked an outside expert to review Dr.
15 Tetnowski's report, is that correct?

16 A That's correct.

17 Q And your normal procedure, as you testified before, is to
18 submit requests for accommodations to outside consultants, is
19 that correct?

20 A When they're made to me, yes, mm-hmm.

21 Q And I believe you stated you very rarely choose not to
22 send them to outside consultants, is that correct?

23 A That's correct.

24 Q So, this was a break from your normal procedure, whereby
25 you did not send Dr. Tetnowski's report to an outside

1 consultant, is that correct?

2 A No, that's not correct.

3 Q This isn't the break from your normal procedure?

4 A It's not, no.

5 Q Am I correct that you have no information to present that
6 can test Dr. Tetnowski's opinion regarding the severity of
7 Mr. Hartman's speed disfluency, is that correct?

8 A I have none, no.

9 Q And you have no information to contest Dr. Tetnowski's
10 opinion that Mr. Hartman's stuttering is very severe, is that
11 correct?

12 A That's correct.

13 Q And is it true that given that Mr. Hartman has not
14 opposed using Text To Speech exclusively on the Step II CS in
15 evaluating this accommodation, you would want to know how
16 much he would speak, is that correct?

17 A I think I did say that to you in my deposition, that his
18 request that has come to light in the Complaint, that he
19 wished to use Text To Speech intermittently, would actually
20 bring up more questions for me about how he would use it, how
21 much he would use it.

22 Q And you'd want to know how much he was actually speaking
23 English to determine whether not this spoken English
24 deficiency sub-component can be scored, is that correct?

25 A Well, I don't actually handle the scoring. I would want

1 to know how he was going to use it, especially, if it might
2 actually get in the way of him being successful on the
3 examination, that it's facilitating him.

4 Q And it would be outside your field of knowledge to know
5 how much one must speak on a Step II CS in order to be able
6 to receive a score in this spoken English deficiency, is that
7 correct?

8 A That's correct. I can't answer that question.

9 Q Just going back to the initial approval of accommodations
10 back in 2008, for Mr. Hartman. That was based on his
11 documentation, as well as the report from Ms. Oldemier, is
12 that correct?

13 A I believe his submission was a personal statement. The
14 report from Ms. Oldemier, three documents from the medical
15 school about the accommodations that he had been receiving
16 there. Those are the things that come to mind in his
17 submission.

18 Q And Ms. Oldemier's report indicated that Mr. Hartman's
19 stuttering was moderate, is that correct?

20 A Yes.

21 Q And Dr. Wilber acknowledged, at that time, when he
22 submitted his request in 2008, that his speech was moderate,
23 is that correct?

24 A I believe that's what she said, yes.

25 Q And that today, the report that we have from Dr.

Farmer - Cross

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1 Tetnowski, indicates that Mr. Hartman's speech disfluency is
2 very severe, is that correct?

3 A I don't recall how he characterized it. Is it in the
4 binder somewhere that I can refer to it?

5 Q Yes, it would be at, I believe, plaintiff's binder, Tab
6 15.

7 (Pause.)

8 A Yes, the SSI-3 that Dr. Tetnowski administered, he
9 reports that it's very severe.

10 Q And while you're at the report and I'm going to refer to
11 page 7 of Dr. Tetnowski's report, he also notes that Mr.
12 Hartman, during reading text, has over eight times as slow as
13 expected speech during spontaneous tests, according to the
14 normative data.

15 A I'm sorry, where are you reading? On page?

16 Q On the bottom of page 7. It says, it appears to be the
17 last sentence. "When assessing the length of time that it
18 takes Aaron to verbally communicate, he's two and a half
19 times as slow as expected during reading tests and over eight
20 times as slow as expected during spontaneous tests, according
21 to normative data.

22 A I see that, yes.

23 Q And you have no information, independently, that that
24 statement is not accurate, is that correct?

25 A Oh, I have no reason to believe it's inaccurate, no.

1 Q And is it fair to say that when evaluating requests for
2 accommodations, NBME is always interested in receiving
3 updated or more current information, is that correct?

4 A I think what you are trying to say is we are looking for
5 evaluation or assessment of their current functioning.

6 Q Yes.

7 A That's correct.

8 Q And Dr. Tetnowski's report is the most current assessment
9 that Mr. Hartman's functioning, to your knowledge, is that
10 correct?

11 A It was his functioning on 12/7/09, that's correct.

12 Q You would agree that it's important to determine whether
13 the absence of an accommodation interferes with the
14 examinee's demonstration of the knowledge or skill being
15 tested, is that correct?

16 A I'm sorry, say that again?

17 Q Would you agree with the statement that it's important to
18 determine whether the absence of an accommodation interferes
19 with the examinee's demonstration of the knowledge or skill
20 being tested?

21 A Yes.

22 Q And would you agree with the statement that it's
23 important to determine whether an accommodation gives an
24 examinee an advantage not available to other test takers?

25 A Yes.

Farmer - Cross

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1 Q And would you agree that Mr. Hartman's use of Text To
2 Speech does not give him an advantage over other test takers?

3 A I really could not agree, no.

4 Q You don't agree?

5 A I don't know that it would or it wouldn't.

6 Q So, you're not saying that using Text To Speech would
7 give him an advantage, is that correct?

8 A I'm saying I don't know. I'm saying there are probably
9 other examinees who would like the examination altered to
10 assist them in some way.

11 Q Well, you've never received any request for Text To
12 Speech, is that correct?

13 A Correct.

14 Q It's not the type of thing that people are really
15 requesting to utilize on the Step II CS, is that correct?

16 A That's correct.

17 MR. WEINER: That's all the questions I have, your
18 Honor.

19 THE COURT: All right.

20 (Pause.)

21 MS. LEOPOLD-LEVENTHAL: Very brief redirect, your
22 Honor.

23 THE COURT: All right.

24 REDIRECT EXAMINATION

25 BY MS. LEOPOLD-LEVENTHAL:

1 Q Has the NBME accepted that Mr. Hartman is a person with a
2 disability for purposes of evaluating his file?

3 A Yes.

4 Q Is it the NBME's position that any use of the Text To
5 Speech device would preclude assessment of the Step
6 sub-component?

7 A I'm actually not sure what the NBME's position is on
8 that.

9 Q Do you believe Dr. Clauser will address that?

10 A Yes, I think right now, the position is that it is a
11 change to the examination.

12 Q Mr. Weiner ask you whether or not the NBME took up or
13 accepted Mr. Hartman's suggestion that the NBME have Mr.
14 Hartman separately evaluated by a speech fluency doctor,
15 correct?

16 A Correct.

17 Q Why didn't the NBME have Mr. Hartman evaluated?

18 A It's certainly not any of our standard procedure to order
19 or request an independent medical examination. The
20 documentation that the guidelines that we have published at
21 the website, are pretty clear about instructing examinees to
22 provide all the documentation that they have. They would
23 know the best what specialists or what evaluators they needed
24 to go to document their impairments.

25 Q Dr. Wilber recommended that Mr. Hartman be granted more

1 time, is that correct?

2 A The first, yes, on the first administration, that's
3 correct.

4 Q And Mr. Hartman, himself, actually asked for more time on
5 the examination on his first application, correct?

6 A That's correct.

7 Q And in support of that, Mr. Hartman provided a report by
8 Ms. Oldemier. She also suggested that Mr. Hartman be given
9 more time, is that correct?

10 A I don't believe Ms. Oldemier made any recommendation. I
11 believe she made a statement that it takes him longer.

12 Q Okay. And Mr. Weiner was asking you what accommodations
13 Mr. Hartman had received at Stoney Brook and suggested that
14 at Stoney Brook, he was uniformly given double time. Did you
15 understand that there was one particular examination,
16 actually, where Mr. Hartman was given only time and a half,
17 rather than double time?

18 A I have heard that, yes.

19 Q And Mr. Hartman, when he submitted his second request for
20 accommodations, did not indicate that he had been given time
21 and a half, did he?

22 A No, he did not.

23 MS. LEOPOLD-LEVENTHAL: No further questions, your
24 Honor.

25 THE COURT: All right, anything further?

Farmer - Redirect

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1 MR. WEINER: No, your Honor.

2 THE COURT: Thank you very much. Thank you, Dr.
3 Farmer.

4 THE WITNESS: Thank you, your Honor.

5 THE COURT: May I, just one question, if I may. I
6 just remembered. When you refer a request to a consultant,
7 is the consultant being asked whether the requested
8 accommodation should be granted or whether some accommodation
9 should be granted?

10 THE WITNESS: Excellent question, your Honor. We do
11 instruct consultants on how to review a request. And they're
12 really looking at a number of things. The first thing that
13 we're asking them to look at is, does the individual's
14 documentation support that they have an impairment that
15 substantially limits a major life activity. And then the
16 second question is, if it does, is their request for
17 accommodation appropriate or is there another more
18 appropriate accommodation. So, the consultant is free to
19 offer suggestions on an accommodation.

20 THE COURT: May I ask this, are there instances in
21 which you have declined to follow whatever recommendation or
22 evaluation made by the consultant?

23 THE WITNESS: There are, your Honor, in limited
24 instances. It's usually in the favor of the examinee.

25 THE COURT: In favor of the examinee?

Farmer - Redirect

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1 THE WITNESS: Yes.

2 THE COURT: All right, thank you very much.

3 THE WITNESS: Thank you.

4 MS. LEOPOLD-LEVENTHAL: Defendant calls Dr. Clauser
5 to the stand. He went to the rest room and he'll be back in
6 a minute's time. Sorry for the delay.

7 (Pause.)

8 BRIAN CLAUSER, Defense Witness, Sworn.

9 THE CLERK: Please just state your full name and
10 spell your last name for the record.

11 THE WITNESS: Brian Errol Clauser, C-L-A-U-S-E-R.

12 DIRECT EXAMINATION

13 BY MS. LEOPOLD-LEVENTHAL:

14 Q Good morning, Dr. Clauser.

15 A Good morning.

16 THE COURT: Good morning.

17 THE WITNESS: Thank you.

18 Q For whom do you presently work?

19 A The National Board of Medical Examiners.

20 Q Please describe, if you would, what the National Board of
21 Medical Examiners actually does?

22 A The National Board of Medical Examiners develops tests in
23 the medical and healthcare field. Primarily, we develop the
24 United States Medical Licensing examination.

25 Q And if you would, for the Court, briefly describe your

1 educational background?

2 A I have a Doctorate from the University of Massachusetts
3 in measurement and assessment. Basically, the focus of that
4 study was in test development and psychometrics.
5 Psychometrics is the theory and practice of assessment.

6 Q What other degrees do you hold, Doctor, for example,
7 under-graduate degree?

8 A I have a Bachelor's Degree from Lehigh University in
9 psychology and a Masters in Education from the University of
10 Massachusetts.

11 Q What is your current position with the NBME?

12 A I am Associate Vice President for Measurement Consulting
13 Services.

14 Q And Doctor, how long have you held that position?

15 A About ten years.

16 Q If you could, give a slightly broader explanation of what
17 it is that a psychometrician does?

18 A We are involved in trying to better understand how to do
19 assessments, so, much of the work that my department does is
20 in research and evaluation both to develop new assessment
21 formats and to evaluate the performance of those formats,
22 both before and after their introduced into the examination.

23 Q Were you an employee of the NBME when the Step II CS exam
24 was first given to prospective medical students?

25 A Yes, I was.

Clauser - Direct

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1 Q What other positions have you held with the NBME?

2 A I was a psychometrician when I began there in 1992 and
3 then became senior psychometrician after a year or two there
4 and held that until I became the Vice President for
5 Measurement Consulting Services.

6 Q What is it, generally speaking, that the Measurement
7 Consulting Services group does?

8 A We primarily do psychometric research and as I mentioned
9 before, that has to do both with evaluating the assessments
10 that we're using now and also developing new assessment
11 formats.

12 THE COURT: Excuse me.

13 MS. LEOPOLD-LEVENTHAL: Yes?

14 THE COURT: Let me interrupt. Is there a CV of Dr.
15 Clauser among our exhibits?

16 MS. LEOPOLD-LEVENTHAL: Yes, it is Exhibit 26 in
17 defendant's binder.

18 THE COURT: 16?

19 MS. LEOPOLD-LEVENTHAL: 26, I'm sorry.

20 THE COURT: 26. Am I allowed to peek at it?

21 MS. LEOPOLD-LEVENTHAL: I'm just -- absolutely.

22 Q Would you please turn to Exhibit 26 in the exhibit binder
23 just in front of you? Yes.

24 (Pause.)

25 Q Do you have Exhibit 26 in front of you, Doctor?

Clauser - Direct

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1 A I do.

2 Q And to the best of your knowledge, is that a true and
3 correct copy of your current CV?

4 A Yes, it is.

5 Q I'm going to ask you a few questions about your CV, but I
6 would like to have Dr. Clauser's CV, which is at Exhibit Tab
7 26 marked as Exhibit D-26 and move that into evidence, at
8 this time.

9 THE COURT: Fine.

10 (Defense Exhibit 26 admitted in evidence.)

11 Q Briefly describe the professional positions you held
12 prior to joining the NBME in 1992.

13 A I worked for numerous years as a psychologist, primarily,
14 at the Belchertown (ph) State School, which was an
15 institution for developmentally disabled individuals.

16 Q Now, if you would, describe the various positions,
17 briefly for the Court, that you have held since joining the
18 NBME in 1992.

19 A As psychometrician and senior psychometrician, I was
20 primarily involved in research activities. When I began in
21 1992, one of my primary duties was doing research into a then
22 developmental project, which we referred to as the
23 standardized patient examination. And that later evolved
24 into the clinical skills examination that we're administering
25 now.

Clauser - Direct

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1 Q And I see that you also have occasionally or worked part
2 time as a professor at Temple University, is that correct?

3 A That's right.

4 Q What course or courses have you taught at Temple?

5 A I taught statistics course for graduate students and I
6 also taught a course on assessment, again, for graduate
7 students in the School of Educational Psychology.

8 Q What is the United States Medical Licensing examination?

9 A The USMLE is a series of examinations designed to assess
10 a physician's readiness for practice. It's a series of
11 examinations that are required for all physicians holding an
12 MD Degree in order to practice in the United States.

13 Q Please describe, if you would, the relationship between
14 that medical licensing examination and the National Board of
15 Medical Examiners?

16 A The national board is a partner in USMLE, so they don't
17 completely control it. They do much of the developmental
18 work, but it's a partnership with the Federation of State
19 Medical Boards.

20 Q And as everyone understands now, the examination has
21 three steps. Both Dr. Farmer and Dr. Katzafrackas (ph) has
22 testified with respect to those steps and obviously, you're
23 familiar with them, correct?

24 A That's right.

25 Q Do you know why the Step II CS examination was first

1 developed and then introduced in 2004?

2 A There was a long-standing belief, not only of people in
3 the governance at the national board and the USMLE, but also
4 throughout the medical education community, that it was
5 important evaluate the hands-on skills of physicians and not
6 just evaluate their knowledge through multiple choice tests.
7 And particularly, of communication in interpersonal skills
8 seemed to be something that was very important.

9 Q What do you understand the Step II CS exam is designed to
10 assess in particular?

11 A Well, it's designed to assess a variety of proficiency
12 skills. Your ability to take a focused history, to formulate
13 a differential diagnosis, to do a focused physical
14 examination, again, to provide support for your diagnosis.
15 But, simultaneously, it's designed to evaluate your ability
16 to speak English and to question, deliver information and
17 establish rapport with a patient.

18 Q Let's move now from assessment, actually, to grading.
19 And if you would, describe how the ICE component, the
20 sub-component is actually graded.

21 A The ICE component is the Integrated Clinical Encounter
22 and there are two separate parts that lead into that. Each
23 case has a checklist, which is scored either yes or no, they
24 achieved this or they did not. And it has to do with the
25 history questions. The areas of patient history that the

1 examinee should ask in order to appropriately collect
2 information. It also has questions about physical
3 examination maneuvers that should be displayed by the
4 examinee. So, those are scored, as I said, correct or
5 incorrect and essentially, there's a sum produced, a weighted
6 sum, depending on how important the items were within each
7 case and then aggregated across cases.

8 In addition to that, there is a documentation or
9 patient note component. After the examinee finishes the
10 encounter with standardized patient, they have ten minutes to
11 record their findings in a structured patient note. Those
12 patient notes are scored by trained physicians, who evaluate
13 both the content and form of the note and give it a score.
14 Again, those scores are aggregated across all the cases. And
15 then those two pieces, the checklist score and the note score
16 are combined to produce the ICE score.

17 Q With respect to the second component, the communication
18 and interpersonal skills, if you would, please describe how
19 that component is graded by the NBME.

20 A With that component, there are three scales, each of them
21 rated from one to nine and the standardized patient scores
22 that. The first has to do with questioning or collecting
23 information. The second with sharing information and the
24 third with establishing rapport with the patient. The
25 examinee is trained in how to use -- the patient, rather, is

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1 trained in how to use those scales and after the encounter,
2 the score the examinee on each of those and then those three
3 scores are summed and then aggregated across cases to produce
4 the score.

5 THE COURT: I'm afraid I missed the first of the
6 three, would you go back and --

7 THE WITNESS: It's information gathering,
8 information sharing and then rapport in a professional
9 manner.

10 Q Now, with respect to the spoken English proficiency
11 component, how is that component graded?

12 A Again, that's scored by the standardized patient. They
13 use a nine point scale and at the completion of the encounter
14 they score the examinee on the clarity of speech, the amount
15 of effort required to understand what the examinee is saying,
16 their use of language and so forth.

17 Q Must the test taker pass all three of the sub-components
18 in a single administration to achieve a passing score on the
19 Step II CS exam?

20 A Yes, they must and not just for convenience. A lot of
21 effort in developing the examination went into understanding
22 the fact that it's important that you be able to display
23 these skills simultaneously. So, you can't simply go in and
24 focus on speaking clearly this time, pass spoken English.
25 Come back next time and focus on establishing rapport. Pass

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1 this, come back a third time and say, well, now I'm going to
2 work on collecting information and getting the diagnosis. In
3 a realistic encounter, you have to do all of these things
4 simultaneously and the emotional stress and cognitive effort
5 required to be thinking, well, what could the differential
6 diagnosis be, what question should I ask next, will likely
7 interfere with your ability to maintain rapport and speak
8 clearly. And so, it's important that you can show that you
9 can do all of those things simultaneously within the context
10 of the encounter.

11 Q Thank you. How often is the Step II CS exam given in the
12 United States?

13 A It's given pretty much throughout the year. At least,
14 five days a week, most weeks of the year.

15 Q If you would, take a look at Exhibit Tab 4 in the other
16 binder, not the one that's in front of you and this is the
17 plaintiff's binder. This document has previously been marked
18 as Exhibit P-6.

19 A You're looking at the score report?

20 Q Yes. And that is a two-page exhibit. What is the first
21 page?

22 A The first page shows the overall pass/fail outcome and
23 the pass/fail outcome for each of the sub-components.

24 Q And then what is reflected on the second page, called the
25 performance profile?

1 A The information on the second page shows the relative
2 performance within each of the major components and then also
3 breaks it down by sub-components within that. So, for
4 example, for the integrated clinical encounter, as I
5 mentioned, it's data gathering and patient note and it shows
6 the kind of sub-score on the plot for each of those and
7 likewise, for the sub-components of communication and
8 interpersonal skills.

9 Q What do the Xs indicate on the performance profile?

10 A The Xs indicate a range representing the performance of
11 the examinee in that particular administration, so that the
12 center of that row of Xs represents the approximate score for
13 the examinee and the length of the row of Xs shows the
14 precision of the score, so the examinee can make a judgment
15 as to whether, given expected measurement error on the test,
16 they would be likely to be above, below or within the
17 marginal range on another administration.

18 Q Taking a look at the integrated clinical encounter, the
19 ICE score on the very first level. Am I correct to say then,
20 that the middle X essentially represents Mr. Hartman's score
21 on that component?

22 A That would be correct.

23 Q And that is a combination of what is subsumed within data
24 gathering and patient note, correct?

25 A That's correct.

1 Q With respect to the CIS component, which is reflected
2 second, why is it that Mr. Hartman's composite score, on his
3 profile, appears to be, at least on here, less than the
4 average of the other two components of that?

5 A Well --

6 Q Other three components?

7 A -- yes, the reason is that it was designed to give
8 relative feedback to the examinees and not to demonstrate how
9 the sub-scores would add up to produce the total score.
10 Basically, this is what we refer to as a situation where
11 they're not scaled the same way. So, there would be no
12 expectation that you could add these three scores for the
13 sub-components and produce the score for CIS overall or add
14 them and reach across them and produce that score. They
15 don't have that same kind of meaning.

16 If you would like more of an explanation of that,
17 what they're really done here is shown relative standing for
18 those scores within the population. So, you can see that
19 within the population, the sub-scores differ, but that won't
20 add up. If I can give you an example of how that's true in
21 another context that might make sense. If you think of the
22 triathlon, you could say, well, the top is standing for
23 someone in the triathlon, the CIS overall. The sub-scores
24 would be standing within the whole group of swimming, running
25 and riding a bicycle. And it's typical, I think, that the

1 person who is first in the triathlon, might very well be
2 second in running, fifth or tenth in swimming and eighth in
3 the bicycle. But when you put all of those together, it
4 moves them further up, because it's more unusual to be very
5 good in all of them. In this case, having three scores this
6 relatively low in the sub-components, produces a overall
7 score that, relatively speaking, is lower than some of the
8 individual scores.

9 Q Thank you.

10 THE COURT: Okay, if I may interrupt for a moment.
11 It's very likely you're coming to this, well, why don't you
12 go ahead and then I'll jump in if there's something that I'm
13 still unsure of.

14 Q Where, with respect to this CIS component, would Mr.
15 Hartman's middle X have needed to be in order for him to have
16 passed that component?

17 A Well, let me begin by saying that this second page of the
18 score report is an approximation. It is only for feedback to
19 the examinee for their own sense of where they might want to
20 give more effort in trying to pass the test in the future.
21 So, this isn't precisely true, but generally speaking, I
22 think the way the intention is that you interpret this is
23 that if the middle X is above the middle of that borderline
24 performance zone, then that would be a passing score. And
25 again, to go back to the question of what that row of Xs

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1 means, what it means in the case of this CIS score, is that
2 our expectation is that on a retest, all else being equal,
3 that the score would remain below the bottom of that
4 borderline zone.

5 MS. LEOPOLD-LEVENTHAL: Did that address your
6 question, your Honor?

7 THE COURT: No, let me inquire a little. I recall
8 that you described a numerical scoring on a scale of one to
9 nine. And so that, the patient would grade, well, with to
10 the CIS component, would grade the examinee on a scale of one
11 to nine for each of the three sub-components, questioning
12 skills, information and sharing skills and professional
13 manner and rapport.

14 THE WITNESS: That's exactly what the patient does.
15 But those numbers are not directly reflected on this page.
16 There is a fair amount of other adjustment that's gone on and
17 the creation of a different score scale that's actually
18 reflected on the page and I'd be happy to say more about how
19 those changes occur.

20 THE COURT: Yes, well, I think that would be
21 helpful.

22 THE WITNESS: Okay, well, one of the -- it would all
23 be very simple if we could just add those numbers up and it
24 would be a scale from three to 27 and that's where we would
25 set our passing standard and so forth. But, in fact, what

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1 we've discovered in implementing the test, is that all cases
2 and all standardized patients are not exactly equal. And so,
3 we go to considerable effort to make adjustments to make sure
4 that the set of standardized patients and the set of cases
5 that any individual examinee encounters are adjusted to
6 produce a similar score.

7 So, if you can think about over the course of two
8 months of testing, we take all the scores that a given
9 standardized patient playing a given case, produces. We take
10 into consideration the examinees that that standardized
11 patient interacted with and we say, for that standardized
12 patient, you give scores that are typically higher than all
13 the other standardized patients playing this same case. So,
14 in order to make everything fair, we're going to adjust those
15 scores down a little bit and then there will be other
16 standardized patients that are in the opposite direction.

17 Well, to make sure that you aren't unduly impacted
18 by the fact that you got a group of very stringent or very
19 lenient patients, we actually make mathematical adjustment to
20 all of those scores. And we make those mathematical
21 adjustments, add those adjustments in to the total score and
22 then it is then that entire score is moved on to a new scale
23 from which the actual pass/fail decisions are made.

24 THE COURT: Did you say that -- I understood you to
25 say that this is a process that requires aggregating and

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1 analyzing a couple of months worth of examinations?

2 THE WITNESS: That's correct.

3 THE COURT: So that, for the individual examinee,
4 there's no report with -- no determination of passing or
5 failing until a couple of months may have gone by since the
6 examination?

7 THE WITNESS: That's exactly right.

8 THE COURT: When a patient is asked to grade the
9 examinee on a scale of one to nine, on questioning skills,
10 is the patient asked to make that scoring a comparative
11 assessment? Does the examinee rate eight on a one to nine
12 scale as against the patient's sense of how others have fared
13 in questioning him or her?

14 THE WITNESS: It is the intention and every effort
15 is made with the training, to try and avoid them making that
16 relative decision, because they might see very different
17 kinds of examinees with very different levels of skill over
18 the course of weeks or months. It so happens that through
19 the annual cycle, the very best students tend to test at
20 certain times of the year and the students with lower ability
21 may either put off their examinations in a systematic way or
22 may actually try and come in earlier. I'm not sure what the
23 specifics of the cycle look like, but I know that there are
24 real cycles in the proficiency of examinees testing. So, we
25 try to have them scaled against a written, absolute standard

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1 that they're to have in their mind.

2 THE COURT: One other thing and I'm sure both Ms.
3 Leopold-Leventhal and Mr. Weiner will think of the question
4 that I'm about to ask is not relevant to anything. They may
5 already have come to that conclusion, but let me try it
6 anyhow. I was curious that you have a scale of one to nine
7 as distinct from what I think many of us are familiar with in
8 all sorts of other settings, a scale of one to ten, sometimes
9 one to five. Is there some greater convenience about a one
10 to nine scale?

11 THE WITNESS: Well, I actually think that there are
12 two separate sources for this. One is more or less
13 historical. A precursor of this examination was being
14 administered by the Educational Commission for Foreign
15 Medical Graduates before it became part of the USMLE. And I
16 believe that the one to nine scale was what was being used
17 there. As a practical matter, the reason that we've been
18 attracted to the one to nine scale is the part of the
19 training for how the standardized patients use the scale is
20 to ask them, first, think about this in three broad
21 categories. This is an okay performance, this is a not so
22 good performance or this is a quite good performance. And
23 so, they start off by thinking, one, two, three, as opposed
24 to four, five, six, as opposed to seven, eight, nine. And
25 then we ask them to, okay, now that you have it within a

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1 broad category, where does it fall within that range? So,
2 it's a convenience for the standardized patients when they're
3 doing the rating, to have these three sort of equivalent
4 blocks.

5 THE COURT: So, the building blocks are to be prime
6 numbers and then we can go from there. I didn't want you to
7 think that I regarded nine as a number to be disfavored.
8 It's important in the law, because we have nine Supreme Court
9 Justices and it's even more important in American life
10 generally, because there are nine innings of a baseball game
11 and nine players on a side. All right, thank you.

12 Q Does any aspect of the evaluation of the CIS component,
13 assess the actual content of what the test taker is saying to
14 the standardized patient?

15 A The CIS component does not really assess the content.
16 That's primarily taken care of in the data-gathering section.

17 Q With respect to the evaluation and it taking
18 approximately two months, are you familiar with the phrase
19 cohort process?

20 A Yes.

21 Q Would you describe for the Court what that phrase means
22 as related to this test?

23 A Well, basically, what it means is that we administer the
24 examination over a period of time. And we then wait until
25 the end of that time frame in order to collect the

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1 information and actually produce the scores. There are two
2 reasons for this and the one is that we want to calculate
3 those adjustments for the relative stringency or leniency of
4 standardized patients, which I referred to before. The other
5 is that when we collect together large quantities of
6 information, it allows us to look at it statistically and be
7 sure that everything is right. Very often, if any problems
8 have occurred in scoring, the computer did not read in the
9 information correctly, something like that and it will show
10 up when viewed against large amounts of data, whereas, if
11 you're only looking at a few scores, you'd have no way of
12 knowing that they weren't completely correct. So, to ensure
13 that the scores are accurate and of the highest quality, we
14 wait until they are all collected.

15 MR. WEINER: Your Honor, I'm going to object and
16 move to strike. Dr. Clauser had not presented a declaration
17 in defendant's response and there was no argument or
18 information that was presented in defendant's response
19 concerning the amount of time it takes to score this
20 examination. So, I request that his testimony along these
21 lines, be stricken, since it's not argued or presented, in
22 any way, in their response to plaintiff's motion for a
23 preliminary injunction.

24 MS. LEOPOLD-LEVENTHAL: I'm not sure I --

25 THE COURT: Are you talking about the witness'

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1 recital that it takes a couple of months to score?

2 MR. WEINER: Yes, your Honor. It's not -- I presume
3 that where this is going is that the exam cannot be graded as
4 we've requested in our motion for a preliminary injunction,
5 that it be graded as soon as possible. I presume that Dr.
6 Clauser's testimony is addressing that that simply can't be
7 done. That argument was not presented in their response to
8 plaintiff's motion for a preliminary injunction.

9 MS. LEOPOLD-LEVENTHAL: Your Honor, it's in Dr.
10 Katzafrakas' declaration at paragraphs 15 and 16 under
11 Exhibit Tab 35, which has been previously introduced as
12 Exhibit D-6. In fact, Dr. Katzafrakas specifically addresses
13 exactly this issue and I don't know of any rule that would
14 require me to submit yet another declaration to say something
15 similar. Certainly, Dr. Clauser is permitted to testify with
16 respect to that subject, which is really directly an issue in
17 the case.

18 THE COURT: I'm sorry, where in the declaration is
19 it?

20 MS. LEOPOLD-LEVENTHAL: It is paragraphs 15 and 16,
21 which are pages five and six.

22 (Pause.)

23 THE COURT: All right, the motion to strike will be
24 denied.

25 BY MS. LEOPOLD-LEVENTHAL:

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1 Q Does the NBME publish, on its website, the schedule for
2 school reporting for 2010?

3 A I believe they do.

4 MS. LEOPOLD-LEVENTHAL: May I approach the witness,
5 your Honor?

6 THE COURT: Surely.

7 Q Please identify that document, Dr. Clauser.

8 A This appears to be the information from the USMLE
9 website, describing when scores will be reported, based on
10 the testing dates.

11 Q And is this available to anyone who clicks on the USMLE
12 website?

13 A Yes.

14 Q And at the bottom of page one and the top to middle of
15 page two, does it identify the score reporting or score
16 window based upon when you take an examination in 2010?

17 A Yes, it does.

18 MS. LEOPOLD-LEVENTHAL: Your Honor, I'd like to mark
19 this document as Exhibit D-27 and move it into evidence, at
20 this time.

21 THE COURT: D-27, all right, fine.

22 (Defense Exhibit 27 admitted in evidence.)

23 Q This was not included in defendant's exhibit binder, so,
24 I will give it to you instead. Now, Dr. Clauser, if an
25 individual tests between March 1st through March 27th, what

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1 is the scoring window for their receipt of their score on the
2 Step II CS exam?

3 A April 21st through May 19th.

4 Q And now, what if an individual tests from March 28th
5 through May 15th, when will they receive their scores?

6 A June 16th to July 14th.

7 Q And there are additional dates indicated thereafter, if
8 the test take takes the examination after May 15th, correct?

9 A That's correct.

10 Q The cohort process that you described, is this done
11 across all five examination centers that exist in the United
12 States?

13 A Yes, it is.

14 Q Why is that?

15 A Well, among other things, there are actually adjustments
16 made to put the scores from the different test centers on the
17 same scale, so that no one will have an advantage because
18 they tested in Philadelphia instead of Chicago.

19 Q If Mr. Hartman took the Step II CS examination this
20 Friday, for example, would he be able to have his tests
21 scored in several weeks?

22 A No.

23 Q Why not?

24 A Well, it would take until, at least, April 21st in order
25 for the steps that I've described before, to be completed as

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1 say to estimate the adjustments, so that they were correct
2 for the examination as it was delivered to him.

3 Q Dr. Clauser, if the NBME was forced to score Mr.
4 Hartman's tests on the Step II CS examination, not using the
5 cohort process, but simply scoring his test in isolation, by
6 itself, would the score that was generated be statistically
7 valid?

8 A It would not.

9 Q Why not?

10 A It would not because the adjustments that would be made
11 typically either couldn't be made at all, which would mean
12 that whether or not he had a passing score, might well depend
13 on whether he was lucky or unlucky in terms of the specific
14 standardized patients that he happened to encounter. Or we
15 would have to use old adjustments and past researches
16 indicated that those old adjustments can be even worse than
17 no adjustment at all.

18 Q What impact, if any, on timing does the physician rater
19 component have on the grading of the Step II CS exam?

20 THE COURT: Would you try that again, please?

21 MS. LEOPOLD-LEVENTHAL: Sure.

22 Q Physicians actually rate the notes that the test taker
23 creates, correct?

24 A Yes.

25 Q And does that impact the scoring window or the timing of

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1 the score in any way?

2 A Well, yes, it does, because it's necessary, although, as
3 I mentioned, the standardized patient does their scoring
4 immediately after the encounter. The notes are actually sent
5 out to these trained physicians to be rated, so, they'll be
6 sent out in weekly blocks, depending on how many people are
7 flowing through the system, at any given point. There might
8 actually be a backlog, so, they're sent out to the
9 physicians, who do the ratings and then return those scores.
10 And for some examinees, those examinees who are close to the
11 cut score on their ICE component, those notes will then be
12 sent out again to another independent set of physicians to be
13 re-scored, so that we're sure that that final decision was
14 not the result of the specific set of raters that the
15 examinee drew.

16 Q So, it's fair to say then that for some applicants, their
17 physician notes are rated multiple times by different
18 physicians, correct?

19 A That's correct.

20 Q And I guess it's possible that -- and you have no way of
21 predicting -- that Mr. Hartman's score could be required to
22 be rated by several physicians, correct?

23 A Yes.

24 MR. WEINER: Objection, leading.

25 THE COURT: Well, we've spending days with leading

1 questions.

2 THE WITNESS: That's correct.

3 BY MS. LEOPOLD-LEVENTHAL:

4 Q Dr. Tetnowski, who was plaintiff's speech doctor,
5 testified earlier in the trial that he believed standardized
6 patients could or would be biased against a person with a
7 stutter, believing that that individual might be less
8 intelligent as a result of their stutter. My question to you
9 is, does the NBME employ any ongoing quality control
10 procedures endeavoring to eliminate SP bias based on any
11 number of prejudicial factors?

12 A Both the training of the standardized patients -- the
13 training of the standardized patients is designed to minimize
14 bias that results from any number of examinee
15 characteristics. And there are also other ongoing quality
16 control procedures to identify standardized patients who
17 might behave in an unusual manner relative to an individual
18 examinee.

19 Q Are you familiar with the Text To Speech device which Mr.
20 Hartman is requesting to use on the Step II CS exam?

21 A I understand what the device does.

22 Q Would you briefly describe what your understanding is as
23 to how the TTS device works?

24 A My understanding is that an individual types words into
25 it and the device produces speech.

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1 Q You've never observed Mr. Hartman using the device, have
2 you?

3 A No.

4 Q And are you familiar with the phrase, fundamental
5 alteration, Dr. Clauser?

6 A Yes, I am.

7 Q Describe, if you know, what that phrase means with
8 respect to the Step II CS examination.

9 A That would be a modification in the examination
10 administration or any other part of it, I guess, that
11 resulted in changing, in some important way, what the
12 examination measured or how it measured in terms of the
13 quality of that measurement.

14 Q Please take a look at Exhibit 16 in plaintiff's exhibit
15 binder, which is the one that doesn't have the white page on
16 the front.

17 THE COURT: I'm sorry, 18 or 16?

18 MS. LEOPOLD-LEVENTHAL: 16, your Honor and it is Dr.
19 Tetnowski's declaration.

20 THE COURT: All right.

21 Q If you would, turn to page five of that declaration. And
22 I am directing your attention to paragraph 20 on page five.

23 A Yes.

24 Q Dr. Tetnowski states in the first sentence, "furthermore,
25 allowing Mr. Hartman to use a Text To Speech program would

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1 not alter the skills or knowledge the Step II CS is intended
2 to measure." Are you with me?

3 A Yes.

4 THE COURT: I'm sorry, which page was that?

5 MS. LEOPOLD-LEVENTHAL: It's page five, it's
6 actually the last page of his declaration and it's Exhibit 16
7 in that binder, but it's paragraph 20.

8 THE COURT: I'm sorry, I was looking at the report.
9 I was at 15 and so, I was not with you. Not, as they say, on
10 the same page. All right, got it.

11 MS. LEOPOLD-LEVENTHAL: And I'm asking the witness
12 about the first sentence where Dr. Tetnowski concludes that
13 the TTS program, in his opinion, would not alter the skills
14 or knowledge the Step II CS is intended to measure. That's
15 paragraph 20, the first sentence.

16 THE COURT: All right.

17 Q Do you agree with that statement?

18 A I do not.

19 Q Why not?

20 A Well, it seems to me, to completely clear, that one of
21 the skills the test is intended to measure is spoken English.
22 And using a device to replace the individual's own speech
23 would be a fundamental alteration.

24 Q But what if, for example, Mr. Hartman just used the Text
25 To Speech device intermittently throughout the Step II CS

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1 exam? Assume that for the purposes of my question. Would
2 the use of the TTS device, in some intermittent fashion,
3 fundamentally alter the NBME's ability to measure Mr.
4 Hartman's spoken English proficiency?

5 MR. WEINER: Objection. This testimony is
6 cumulative. Dr. Katzafrakas is and also testified along
7 these lines and I believe Dr. Farmer had also testified.
8 This is now the third person to testify about fundamental
9 alteration.

10 MS. LEOPOLD-LEVENTHAL: Well, actually, this witness
11 is testifying with respect to the measurement and grading
12 process. The others were testifying actually with respect to
13 the skills that the Step is designed to assess. So, I am
14 asking Dr. Clauser, who is our psychometrician, whether or
15 not intermittent use of the device would affect the
16 measurement of the set component.

17 THE COURT: Well, I'll overrule the objection. Go
18 ahead.

19 THE WITNESS: I believe it would interfere with the
20 measurement.

21 BY MS. LEOPOLD-LEVENTHAL:

22 Q And why is that?

23 A Well, to go back to an answer that I believe I gave
24 before, the examination is designed to evaluate how an
25 examinee will behave, won't display all of these skills

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1 simultaneously in a very realistic encounter. And if I can
2 use another device so that I don't have to speak at a point
3 that I'm having trouble for one reason or another, be that
4 the cognitive effort required because I'm thinking about the
5 diagnosis or be that the emotional effort required because of
6 some aspect of the case. The additional effort that might
7 lead to in terms of maintaining rapport, it's at those very
8 moments that we're most interested in seeing that you can
9 continue to speak fluently or at those very moments that
10 we're interested in seeing that you can continue to maintain
11 rapport. So, it is this total performance throughout the
12 entire encounter that we're interested in evaluating.

13 Q Are you able to identify, Dr. Clauser, what percentage
14 Mr. Hartman would have to actually speak versus using the
15 Text To Speech device, which would be enough to allow the
16 NBME to measure the set component? What would be enough
17 spoken English?

18 A I don't think that there's actually an answer to that,
19 because if you're using this device, you are more or less, by
20 definition, using it at the point that this cognitive load or
21 emotional load is at it's maximum, so, we're changing the
22 nature of the sample. It isn't just a question of having
23 enough samples of speech, it's having the samples of speech
24 over this entire range of the interaction and the difficulty
25 of that, the multi-tasking involved in doing these things

1 simultaneously.

2 Q Plaintiff and his attorney have suggested that if
3 plaintiff used the Text To Speech device, he would actually
4 be able to communicate more and as a result, that would
5 increase your sample size. Would that, then, if you consider
6 the Text To Speech intermittent use that way, allow the NBME
7 to measure the set component, if it actually enabled Mr.
8 Hartman to speak more?

9 A It isn't a question of more. As I've just said, it's a
10 question of being able to sample that speech throughout the
11 encounter so that you can see what the speech is like as the
12 other demands of the encounter are taking place. So, it
13 isn't a question of simply more.

14 Q Plaintiff and his attorney have also suggested that some
15 examinees speak less during the encounter and some examinees
16 might speak more. Would you agree with that?

17 A I'm sure they do.

18 Q Well, if you have an examinee that speaks on the low end
19 of that, just a little bit and Mr. Hartman actually
20 articulates -- actually speaks more than that test taker, why
21 can't you then evaluate his spoken English, because he spoke
22 more than another test taker during that encounter?

23 A Well, again, it isn't simply how much you speak. Some
24 people are very chatty, they use a lot of words to say what
25 other people can say in brief phrases. It isn't how much you

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1 speak, it's how you speak throughout this integrated
2 encounter. Integrated in the sense that you have to be doing
3 all of these skills simultaneously.

4 Q What impact, if any, would elimination of the set score
5 from Mr. Hartman's score report have, if you know?

6 A My assumption is that eliminating the set score would
7 make it impossible to receive a passing score on the
8 examination.

9 MR. WEINER: I'm going to object and move to strike,
10 your Honor. The doctor just testified about an assumption.
11 It's not based on actual knowledge.

12 THE COURT: I'll sustain the objection.

13 BY MS. LEOPOLD-LEVENTHAL:

14 Q You're aware that the NBME has granted other applicants
15 with a speech disfluency additional time as an accommodation
16 on this examination, correct?

17 A Yes.

18 Q In fact, you understand that the NBME granted Mr. Hartman
19 time and a half for the entire clinical skills test, correct?

20 A Yes.

21 Q Assuming that those individuals were disabled, does the
22 NBME believe that granting a test taker additional time was
23 an appropriate accommodation?

24 A Yes.

25 Q And why is that?

Clauser - Direct

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1 A I believe that the decision was made based on wanting to
2 allow the individual to display their skills, but still
3 maintain the basic integrity of the encounter.

4 Q Does the NBME believe that granting a test taker double
5 time when they exhibit a speech disfluency fundamentally
6 alters the ability of the NBME to measure their performance
7 on this examination?

8 A No.

9 Q Are you aware that on one occasion, the NBME allowed a
10 hearing-impaired test taker to utilize a dual sign language
11 interpreter on the Step II CS exam?

12 A I am.

13 Q And does the NBME believe that use of a dual sign
14 language interpreter fundamentally alters assessment of the
15 skills on the Step II CS exam?

16 A The NBME drew the conclusion that with that
17 accommodation, it was impossible to assess spoken English
18 proficiency.

19 Q Why did the NBME, if you know, permit that accommodation
20 to the hearing-impaired test taker?

21 A I believe that their intention was to allow that person
22 to display the skills that they were able to display and they
23 recognize that they would not be able to display that one
24 skill, it wouldn't be able to be measured.

25 Q If Mr. Hartman used the Text To Speech device only to

1 supplement his speech, can't the NBME score or evaluate or
2 assess Mr. Hartman's written English proficiency in
3 conjunction with his spoken English proficiency?

4 A I think it's clear that the intention of the spoken
5 English proficiency score is to provide an assessment of
6 spoken English proficiency and it is well understood by the
7 content experts, who developed the test, that a spoken
8 English proficiency and reading and writing proficiency in
9 English are two very different things.

10 Q And is a perspective medical doctor's written English
11 proficiency in part, assessed on other parts of the USMLE?

12 A Written English proficiency is specifically assessed in
13 the context of the patient note or documentation score on the
14 clinical skills evaluation.

15 Q If Mr. Hartman utilized the Text To Speech device, either
16 in part or throughout the entire examination, would measuring
17 the skills on the other two sub-components, ICE and CIS,
18 would they be affected or impacted by use of the TTS device?

19 A I think that it's kind of likely that the ICE component
20 would be affected. It may well be the case that the CIS
21 component would be affected.

22 Q Would you agree with me that most United States and
23 Canadian examinees passed the sub-component?

24 A Yes.

25 Q Well, if this is the case, wouldn't you agree with me

Clauser - Direct

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1 that the Step II CS exam is really only weeding out those
2 international and medical students who have some sort of
3 accent that might be thick and difficult to understand?

4 A It is my understanding that the committees that
5 established the test made an affirmative decision that
6 everyone needed to display the spoken English proficiency.
7 The fact that it wasn't displayed, it wasn't evaluated
8 earlier, is more likely to have to do with the fact that
9 there weren't that many people who would fail, not with the
10 fact that it wouldn't be important to identify those people.
11 My understanding is that there has, at least, been some U.S.
12 students who have failed in the past. I don't know how many.

13 Q Why does the NBME believe that spoken English proficiency
14 and communication with the patient and rapport building are
15 important skills to evaluate in determining whether or not a
16 particular individual should be licensed as a medical doctor?

17 A There is a great deal of literature suggesting that being
18 able to communicate with patients and establish that rapport,
19 directly impacts patient outcomes. That physicians who
20 communicate better and establish rapport are much more likely
21 to have compliance with treatment and they are much more
22 likely to have patients who make informed decisions about
23 their treatment. And this again, is one of the primary
24 forces that led to introducing this examination.

25 Q Thank you, Dr. Clauser, no further questions.

Clauser - Direct

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1 THE COURT: Shall we take a recess before you
2 cross-examine?

3 MR. WEINER: I would appreciate that, your Honor. I
4 was about to ask for one.

5 THE COURT: All right, we'll take ten minutes.

6 (Court in recess 11:08 to 11:29 o'clock a.m.)

7 THE COURT: Does it seem chilly in here or is it --

8 MR. WEINER: I'm comfortable, but I know --

9 THE COURT: It is chilly, yes.

10 MS. LEOPOLD-LEVENTHAL: It is chilly.

11 THE COURT: I'm going to see if we can get in touch
12 with the landlord. Be right back.

13 (Court in recess 11:29 to 11:37 o'clock a.m.)

14 THE COURT: Please sit down. I'm not sure how quick
15 a response we'll get, but we'll try. All right, Mr. Weiner.

16 MR. WEINER: May I, your Honor?

17 THE COURT: Go ahead.

18 CROSS-EXAMINATION

19 BY MR. WEINER:

20 Q Good morning, Dr. Clauser. We haven't had an opportunity
21 to meet. I'm Charles Weiner and I represent Mr. Hartman.

22 A Good morning.

23 Q Is it fair to say that you're unable to state that Mr.
24 Hartman's disability was not a factor in his performance on
25 this Step II CS examination?

Clauser - Cross

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1 THE COURT: The question, as I understand it was, is
2 the witness unable to say that the disability was not a
3 factor?

4 MR. WEINER: Yes.

5 THE COURT: I always have to work my way through
6 double negatives, but we'll -- all right.

7 THE WITNESS: In the very strict sense of that, yes.

8 Q Are you familiar with the USMLE composite committee?

9 A Yes.

10 Q And what is its purpose?

11 A The composite committee contains representatives of the
12 organizations that put on USMLE and they make policy
13 decisions that are at a higher level than those that are made
14 by the individual committees managing the specific
15 examinations.

16 Q Then there would be a representative from the NBME on the
17 composite committee, is that correct?

18 A There would.

19 Q Are you one of the members of the composite committee?

20 A I am not.

21 Q Have you ever been?

22 A No.

23 Q Have you ever been an advisor to the composite committee?

24 A Insofar as I have been advisor to the NBME
25 representatives, they perhaps would say yes. I'm not aware

1 that there are formal advisors.

2 Q Have you made any presentations to the composite
3 committee?

4 A No.

5 Q Were you present at the January 16 through 18, 2004
6 composite committee retreat?

7 A No.

8 Q Do you ever view any of the composite committee reports
9 to get an understanding of what policy decisions have been
10 made?

11 A Yes.

12 Q Did you review the minutes from the composite committee
13 retreat that took place in January 16th through 18th, 2004?

14 A Without knowing the specifics of the content, I couldn't
15 tell you based only on a date.

16 Q I'd like you to go to the plaintiff's binder. That's the
17 binder that is black in front. And turn to Tab 26.

18 (Pause.)

19 A Yes.

20 Q Do you recognize this as being the minutes from the
21 January 16 through 18, 2004 composite committee retreat or at
22 least, a redacted version of it?

23 A I recognize it because that's what it says. I'm
24 certainly familiar with the content as something that was
25 discussed in some detail at the national board in preparation

1 for the discussions by the composite committee.

2 Q If you turn to the third page. There is a middle
3 paragraph identified or with the header of signers and
4 assisted communication devices, ACDs. Do you see where I'm
5 reading from?

6 A Yes, I do.

7 Q And in this report, it says staff and sub-committee
8 members discussed the fact that signers or ACDs, example Text
9 To Speech device, might vary in appropriateness as an
10 accommodation, depending on the direction of the
11 communication. For example, for the purposes of
12 communications from SP to the examinee, there seems to be
13 some agreement that such accommodations might be appropriate.
14 However, allowing a signer or ACD as part of the
15 communication from the examinee to the SP, may make it
16 difficult for the SP to assess the examinee on such things as
17 history taking, communication or interpersonal skills. The
18 use of these accommodations for communication from examinee
19 to SP, has not yet been resolved. Is that -- was that your
20 understanding of the report data of the composite committee
21 back in January, 2004?

22 A Yes.

23 Q And if we turn to Tab 28 of plaintiff's binder. These
24 are the redacted minutes from a June, 2004 meeting of the
25 composite committee. Do you recognize this?

Clauser - Cross

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1 THE COURT: Maybe, if you're going to address this,
2 Mr. Weiner and I won't interrupt, at this point. But you're
3 moving to another tab, which tab is that?

4 MR. WEINER: Yes, I'm sorry, your Honor, it's Tab
5 28.

6 THE COURT: All right, go ahead.

7 Q And do you recognize this as being the minutes of the
8 June, 2004 composite committee meeting?

9 A I imagine they are.

10 Q Is there any statement in these minutes, indicating
11 whether or not the concern expressed in the January minutes,
12 has been resolved with respect to use of ACDs, such as Text
13 To Speech?

14 A I'm not familiar with the specific decision regarding
15 that, so, I'd have to review these.

16 Q Please do.

17 (Pause.)

18 A I don't see this directly addresses the use of a device.
19 Perhaps I missed something.

20 Q My question is, would you agree that there's no mention
21 of any decision with respect to ACDs or Text To Speech in the
22 June, 2004 meeting minutes?

23 A There doesn't appear to be.

24 MR. WEINER: And your Honor, just to retrace my
25 steps, I'd like to mark as Exhibit 22, the document contained

1 under Tab 26.

2 THE COURT: All right.

3 (Plaintiff's Exhibit 26 admitted in evidence.)

4 MR. WEINER: And I would like to mark as Exhibit 23,
5 the document contained under Tab 28.

6 THE COURT: All right.

7 (Plaintiff's Exhibit 23 admitted in evidence.)

8 Q Doctor, can you turn now to the document contained under
9 Tab 30 and please take however much time you need to review
10 that document, as well.

11 (Pause.)

12 A I believe I'm familiar with this.

13 Q All right. And would you agree that there is no mention
14 in the January 2005 minutes of any decisions with respect to
15 ACDs and Text To Speech?

16 A That's correct.

17 Q Now, these are the latest minutes that I have received
18 from the composite committee from defendant's counsel. Are
19 there no other minutes of the composite committee after
20 January, 2005?

21 A I would presume that there are minutes.

22 Q Are there any decisions in those minutes with respect to
23 ACDs or Text To Speech?

24 A Since I don't attend those meetings, I wouldn't have a
25 way of actually knowing that.

1 Q Are you aware of any decision, at any meeting subsequent
2 to January of 2005, regarding decisions on use of ACDs or
3 Text To Speech by the composite committee?

4 A I'm not aware of them having a discussion on that topic.

5 Q Are you on the Step II committee?

6 A I am not.

7 Q And referring to the document contained under Tab 30?

8 A Mm-hmm.

9 Q And looking at the second page under the heading, Update
10 on Testing Accommodations for Step II CS.

11 A Yes.

12 Q It states there, Dr. Dillon provided an update on recent
13 efforts by staff and the Step II committee, to consider
14 whether a certain testing accommodation, i.e., the sign
15 language interpreter for communications for the examinee to
16 the standard patient, might alter the communication and
17 interpersonal skills CIS component of the Step II.

18 THE COURT: I'm sorry, which -- where are we now?

19 MR. WEINER: We are under Tab 30 and this is page
20 two.

21 THE COURT: Tab 30, page two.

22 (Pause.)

23 THE COURT: Oh.

24 MR. WEINER: Okay, your Honor, I wasn't sure if you
25 wanted me to proceed.

Clauser - Cross

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1 THE COURT: I'm sorry, I didn't --

2 Q Dr. Clauser, did you see where I was reading from there?

3 A Yes.

4 Q Okay. And further down in that same paragraph, it says,
5 "the composite committee approved the recommendation of the
6 Step II committee that the CIS sub-component can be reported.
7 Provided that the score report and transcript are annotated
8 to reflect the accommodation." Was that your understanding
9 of the composite committee's decision?

10 A Yes.

11 Q So, at that time, the composite committee made a policy
12 decision that when one has a two-way sign language
13 interpreter, that the CIS sub-component can be reported, is
14 that correct?

15 A Yes.

16 Q And that what would be done in terms of the score report,
17 is it would be annotated to reflect that type of an
18 accommodation, correct?

19 A That's correct.

20 Q And if we go, still on page three, to the last sentence,
21 I believe, it says, "the composite committee determined that
22 the pass/fail status for such individuals will be pass, ICE
23 and CIS only. That the score report and transcripts will
24 indicate that this status will be determined by the
25 performance on the CIS and ICE sub-components only. And that

1 the score report and transcripts will be annotated to reflect
2 the testing accommodations." Do you see where I'm reading?

3 A Yes, I do.

4 Q So, for an individual who has received a two-way sign
5 language, they will be scored on the CIS sub-component and
6 the ICE sub-component, correct?

7 A Yes.

8 Q And that the test would reflect that the individual
9 received a sign language interpreter on their score report,
10 is that correct?

11 A Correct.

12 MR. WEINER: And I would like to have the document
13 under Tab 30 marked as Exhibit 24, your Honor.

14 THE COURT: Fine.

15 (Plaintiff's Exhibit 24 admitted in evidence.)

16 Q Doctor, I'm trying to get a bit of a visual of the score
17 sheets that you've referred to, that these standardized
18 patients use. Is this a single piece of paper or multiple
19 pieces of paper?

20 A I actually think they do this on a computer.

21 Q Okay. So, what occurs is the standardized patient is
22 examined by a student and then they leave the exam room and
23 put their scores into a computer?

24 A The examinee leaves the room and the standardized patient
25 moves to the computer and enters their scores.

Clauser - Cross

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1 Q All right. How many different, let's say, under the SEP
2 section, how many different criteria is the standardized
3 patient putting the one through nine number system to?

4 A What they have is a list of descriptors that is their --

5 THE COURT: Excuse me, just one second.

6 (Pause.)

7 THE COURT: My apologies, there is -- which I had
8 neglected to note was due at noon, not a very long one.
9 It's a matter of swearing somebody in to our District Court
10 bar. But I am going to have to take, I'm sorry, a ten-minute
11 recess and this time, I do mean ten minutes.

12 MR. WEINER: Will that be in this courtroom?

13 THE COURT: No, nothing that needs to disturb any of
14 you. But it's an accommodation I would appreciate.

15 (Court in recess 11:58 to 12:09 o'clock p.m.)

16 THE COURT: All right.

17 MR. WEINER: May I proceed, your Honor?

18 THE COURT: Please.

19 Q Dr. Clauser, you, before the break, had indicated that on
20 the score sheet or on the computer screen, there's a list of
21 descriptors that the standardized patient put some type of a
22 numerical rating to, is that correct?

23 A That's correct.

24 Q And are the descriptors segmented by the different, the
25 three different assessment areas, such as SEP, CIS and ICE?

1 A No, we're talking about a specific scale. So, there will
2 be a spoken English scale and the descriptors are all within
3 that scale relevant to spoken English proficiency. The
4 descriptors in the communication and interpersonal skills
5 scales, those three scales are specific to the components of
6 those three scales. So, information gathering, information
7 sharing and professional manner and rapport, in that case.

8 The data gathering aspect of this is not one of
9 those scales. It's, as I mentioned before, a checklist that
10 shows whether you actually did ask specific questions or not.

11 Q Okay. And so, the standardized patient would know, in
12 terms of attributing some type of a rating, whether it was an
13 SEP sub-component that they were scoring, as opposed to a CIS
14 sub-component issue --

15 A Yes.

16 Q -- they were scoring, is that correct?

17 A That's correct.

18 Q So, under the SEP, how many descriptors are there that
19 are rated by the standardized patient?

20 A I couldn't tell you without actually looking at the form.
21 There are several descriptors though, that describe how
22 difficult it is to understand the speech fluency, choice of
23 words and that sort of thing. The descriptors are, however
24 to remind the standardized patient of the training they've
25 had and what the scale actually means.

1 Q And for each descriptor, is there a numerical rating that
2 the --

3 A No.

4 Q Okay, what is it that they give a numerical rating to?

5 A They give an overall numerical rating to that scale. In
6 the case of spoken English, it is an overall numerical rating
7 that reflects the individual's speech in the context of that
8 encounter.

9 Q Okay, so, they're not looking at, for example, these
10 various descriptors and saying, I had difficulty listening to
11 the test taker, I'll give him a nine on this. The test taker
12 had to repeat himself five or six times, I'll give him a nine
13 for that. It's not scored that way, am I correct?

14 A That's correct.

15 Q It's just one numerical rating for the SEP section,
16 correct?

17 A That's correct. Well, it's one numerical rating times 11
18 different standardized patients, yes.

19 Q Are you familiar with the Committee to Evaluate the USMLE
20 Program?

21 A Yes.

22 Q And did they prepare a report on their recommendations in
23 June of 2008?

24 A I know they prepared a report. I couldn't speak to the
25 date associated with it.

Clauser - Cross

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1 (Pause.)

2 MR. WEINER: May I approach the witness, your Honor?

3 THE COURT: Please, go ahead.

4 Q I'm showing you a report which is entitled Comprehensive
5 Review of USMLE. Doctor, can you take some time to take a
6 look through this report?

7 A Sure.

8 MS. LEOPOLD-LEVENTHAL: Objection, your Honor, I
9 don't know that Mr. Weiner has laid any foundation. Dr.
10 Clauser has said he's familiar with the fact that a report
11 was generated, but unless he has some familiarity with this
12 particular report, I don't know that any questions that he
13 would be asked right now, are either relevant or within the
14 scope of what he has a foundation for.

15 MR. WEINER: I was about to ask if he was familiar
16 with the report, but will do so after he reviews.

17 THE COURT: All right.

18 MS. LEOPOLD-LEVENTHAL: Could we, perhaps, have him
19 ask the witness that before he spends a lot of time
20 familiarizing himself with it. If he's never seen it before,
21 I don't know what he could say about it.

22 MR. WEINER: That's fine with me, your Honor.

23 THE COURT: Okay.

24 BY MR. WEINER:

25 Q Dr. Clauser, have you seen and reviewed this report

1 before?

2 A I have not reviewed the report. I'm familiar with the
3 work of the committee.

4 Q Okay. And would the work of the committee be summarized
5 in this particular report?

6 A Yes.

7 Q And do you know whether or not this report is available
8 on NBME's website?

9 A I would assume that it is.

10 (Pause.)

11 Q Were you on the committee that provided this report?

12 A My recollection is that this was an external committee.

13 Q Were you involved, at all, in the findings or
14 recommendations that were made by this committee?

15 A I was present at many of the meetings. I wouldn't have
16 been involved in actually producing the report.

17 Q I would like you to turn to page five of this report.
18 And I'm looking under the column, review of survey data.

19 A Yes.

20 Q It says, "Staff and CEUP" (ph) and CEUP is an acronym for
21 the committee, correct?

22 A Yes.

23 Q "Staff and CEUP member review of the data gathered
24 through surveying revealed some general trends described
25 below." Were you part of the staff that's referred to in

1 that particular sentence?

2 A No.

3 Q Is the information contained in this report something
4 that your staff would be involved in?

5 A My staff?

6 Q Yes.

7 A No.

8 Q Why is that?

9 A This is the kind of thing that would have been handled in
10 another part of the organization.

11 Q Under number two --

12 THE COURT: Another part of your organization?

13 THE WITNESS: Correct.

14 Q Under number two, in the same column, there's a statement
15 there and it says, "qualify of USMLE in assessing knowledge
16 and skills needed for licensure, there was sense that UMLE
17 did a good job in assessing all of these areas with the
18 exception of the Step II CS." Were you aware of that
19 particular finding from this report?

20 A I'm not sure what you mean by finding. What I believe
21 this is telling us is that that is the impression of external
22 individuals or groups and not a decision by this committee.

23 Q All right, so, the impression by this outside review
24 group --

25 A No. No, this is our survey data, so, they are -- when we

1 went out into the community, if you will, that is to say, to
2 survey individuals or have meetings with groups that these
3 are some of the points that individuals external to the
4 organization and by and large, individuals who would know
5 nothing about the specifics of the assessment. This would
6 represent their opinion.

7 Q The individuals that you're referring to, are they
8 physicians?

9 A They may very well have been medical students, deans, who
10 would have a concern that as many of their students as
11 possible passed the test. A broad group of people who have
12 specific interests and are constituency groups in that we
13 reach out to them. But people who have clear interests that
14 are often at odds and very strongly at odds with protecting
15 the public.

16 Q Are you saying medical schools are not interested in or
17 have different views that the NBME has with respect to
18 protecting the public?

19 A I can tell you that when we survey student affairs deans,
20 they all believe that the cut score should be lowered because
21 the very fact that they graduated a student means that they
22 must be eligible to receive a license. And other
23 constituency groups have very different points of view. And
24 the wise, I believe, individuals who staff the external
25 committee who actually establish the cut scores, have very

1 different points of view. So, and again, students, if you
2 ask Step I students whether the standards, people who have
3 taken Step I, whether the standards for Step II are too high,
4 they haven't taken that yet. They're likely to say yes. If
5 you ask them whether the standards for Step I were too high,
6 they're likely to say no, because they've already passed. We
7 see clear patterns of people responding in their own personal
8 perspective. It also happens to be their personal self
9 interest, whether the two are clouded, I can't say. But
10 medical education, as political an activity as most other
11 activities and you get all kinds of perspectives.

12 Q It sounds like you've done some surveying of the various
13 groups yourself?

14 A Yes.

15 Q Okay. And the survey referred to here, these are surveys
16 done of individuals who are associated with the medical
17 profession, is that correct?

18 A I imagine they were.

19 Q All right, so, it might be deans of different medical
20 schools, correct?

21 A It might be.

22 Q And it might be students in medical school, correct?

23 A It might be.

24 Q And it might be physicians who are practicing medicine,
25 is that correct?

Clauser - Cross

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1 A Might be.

2 Q Okay. Thank you, that's all I have, your Honor.

3 MS. LEOPOLD-LEVENTHAL: No redirect, your Honor.

4 THE COURT: No redirect?

5 MS. LEOPOLD-LEVENTHAL: No redirect.

6 THE COURT: All right, I think you are excused, Dr.

7 Clauser, thank you very much.

8 (Pause.)

9 MR. WEINER: Your Honor, one bit of housekeeping,
10 there was a document which was presented to Mr. Hartman by
11 defendant's counsel when he was on the stand and I was under
12 the belief it was put in as an exhibit and it wasn't.
13 Counsel and I have stipulated that this document can be
14 introduced and there won't be a need to have Mr. Hartman come
15 up and --

16 THE COURT: I see.

17 MR. WEINER: -- to testify about the document.

18 THE COURT: All right.

19 MR. WEINER: And this document will be marked as
20 Exhibit 25.

21 THE COURT: Plaintiff's 25?

22 MR. WEINER: Yes, your Honor.

23 THE COURT: What is that document?

24 MR. WEINER: It is an October 5th letter from Dean
25 Chondrin of Stoney Brook University Medical Center,

1 concerning the licensing requirements.

2 (Pause.)

3 THE COURT: All right.

4 MS. LEOPOLD-LEVENTHAL: Defense rests, your Honor.

5 THE COURT: Well, how do counsel wish to proceed?

6 Is it, now that we've completed all the testimony, is it your
7 wish to have argument?

8 MR. WEINER: Yes, your Honor.

9 THE COURT: Well, it will be 12:00 o'clock. Should
10 we -- do you want to commence argument now, with a view of
11 recessing at 12:30 or thereabouts or would it not be sensible
12 for -- oh, it's already, I'm sorry, I guess I misread that
13 clock.

14 MS. LEOPOLD-LEVENTHAL: I'm not sure what your
15 schedule is or how hungry your are. Mr. Weiner and I are
16 both happy to finish our closing now and then be finished.
17 If you'd like to take a lunch breach, that's certainly up to
18 you.

19 THE COURT: Well, how long would anticipate your
20 arguments would be?

21 MR. WEINER: I surmise my argument is probably in or
22 around ten or 15 minutes, your Honor.

23 THE COURT: 10 or 15 minutes.

24 MS. LEOPOLD-LEVENTHAL: Maybe about 20.

25 THE COURT: Well, let's go ahead then, now.

1 (Pause.)

2 MR. WEINER: Your Honor, we are here requesting that
3 the Court grant the plaintiff's motion for a preliminary
4 injunction. In order to establish the necessary elements of
5 a preliminary injunction, three elements must be -- four
6 elements must be met.

7 First, Mr. Hartman's -- that Mr. Hartman is likely
8 to succeed on the merits. Two, that Mr. Hartman is likely to
9 suffer irreparable harm in absence of the preliminary relief.
10 Three, that the balance of equities tips in Mr. Hartman's
11 favor and four, an injunction is in the public interests.

12 In order to establish the merits, we first go to the
13 Americans With Disabilities Act, which requires that private
14 entities, such as NBME, that administer examinations, do so
15 in place and manner accessible to persons with disabilities
16 and offer alternative accessible arrangements for such
17 individuals.

18 The regulations that codify that particular
19 provision indicate and this is Regulation 29 CFR,
20 36.309(b)1(i), which mandates that the "examination is
21 selected and administered so as to best ensure, to best
22 ensure that when the examination is administered to an
23 individual with a disability that impairs sensory, manual or
24 speaking skills, the examination results accurately reflect
25 the individual's aptitude or achievement level, rather than

1 reflecting the individual's impaired sensory or manual
2 speaking skills."

3 The regulation further mandates, your Honor, that
4 NBME provides appropriate auxiliary aids for persons with
5 impaired speaking skills, unless they can demonstrate that
6 offering a particular auxiliary aid would fundamentally alter
7 the measurement of the skill or knowledge the examination is
8 intended to test or would result in an undue burden.

9 In the context of testing accommodations, plaintiff
10 establishes a prima facia case when plaintiffs shows, one, he
11 is disabled. Two, the request is reasonable, the request for
12 the accommodation is reasonable. And three, that the request
13 has been denied. There has been absolutely no dispute that
14 Mr. Hartman is disabled. We have heard testimony from Mr.
15 Hartman, certainly just observing his testimony, that can be
16 determined. We've heard the expert testimony, unrefuted
17 expert testimony of Dr. Tetnowski, that he is disabled and in
18 fact, his speech is severe, as he has a severe disfluency as
19 Dr. Tetnowski had testified. And even Dr. Farmer had
20 concluded that Mr. Hartman has demonstrated to her
21 satisfaction that he is a person with a disability.

22 There is no dispute that the Text To Speech has been
23 denied as an accommodation. We have heard throughout this
24 trial, throughout this hearing, excuse me, that the Text To
25 Speech was being denied by the NBME.

1 So, the only issue that appears to be in dispute, in
2 terms of plaintiff's prima facia case, is whether or not that
3 request is reasonable. The determination of whether
4 modification is reasonable involves fact-specific case by
5 case inquiry. That considers, among other factors, the
6 effectiveness of the modification and the cost to implement.
7 And that was the decision that was rendered in D'Amico versus
8 New York Board of Law Examiners.

9 The regulations on this particular issue, which is
10 28 CFR, Part 36, Appendix B, states, "the auxiliary
11 requirement is a flexible one." And various alternatives may
12 be considered "as long as the result is effective
13 communication. The central question is whether or not the
14 individual with the disability is able to employ an effective
15 method." And the emphasis here is on effective
16 communication.

17 Dr. Tetnowski had testified, your Honor, that due to
18 the severity of Mr. Hartman's speech, that additional time is
19 just simply not an effective method of communicating for him
20 at the present. There has been no expert testimony, no
21 consultant, no one from NBME's perspective, who has reviewed
22 any of the reports from Dr. Tetnowski to state otherwise.
23 There has been no one who has evaluated Mr. Hartman
24 presently, to state otherwise. And Dr. Tetnowski had
25 indicated and had testified that Mr. Hartman is severely

1 impaired. In fact, he is one of the most impaired
2 individuals he has encountered in his practice.

3 He had also indicated and noted that the rate of
4 speech is eight times slower and that blocks last as long as
5 two minutes. There has been no testimony here presented that
6 indicates that double time would be effective.

7 Because of this determination -- because of the
8 determination whether an accommodation is reasonable, one
9 should be reviewing, the Court should be reviewing the
10 medical or professional opinion. And the Court relies upon
11 those opinions, particularly of the claimant's evaluator and
12 that claimant's evaluator is to be given or accorded great
13 weight. And that's also contained in the D'Amico decision.

14 In NBME's defense as to the reasonableness of the
15 accommodation is really based on the fact that he has
16 received double time accommodations for numerous oral
17 examinations as well as some clinical examinations while he
18 was in medical school. That data is old data. It was based
19 on a 2007 report from Ms. Oldemier, which is contained in the
20 exhibits. That particular report notes that Mr. Hartman's
21 speech, at that particular point in time, was moderate
22 disfluency. Dr. Tetnowski has indicated, based on his
23 evaluation, that has completely changed in numerous respects.

24 Ms. Oldemier's report indicated that Mr. Hartman's
25 disfluency often contains blocks on the average of three

1 seconds. It's much more significant presently. Ms.
2 Oldemier's report indicates that Mr. Hartman has a more
3 difficult time reading, rather than producing spontaneous
4 speech. That's completely different from the present.

5 So, in terms of assessing Mr. Hartman's performance
6 on all examinations, the clinical examinations that occurred
7 several years ago in medical, that's simply not an
8 appropriate comparison. Secondly, Mr. Hartman testified in
9 great detail regarding the numerous differences between the
10 Step II CS examination, as well as every examination he had
11 taken while he was in medical school. Some of those
12 differences were particularly key to the ability that he has
13 -- to the manner in which he is assessed and the manner in
14 which he is able to communicate. One of those big
15 differences is that the standardized patients or perhaps, the
16 acting patients that are utilized in medical school were
17 individuals who were familiar to him. And Mr. Hartman's
18 stutter is not as severe when speaking with individuals who
19 are familiar to him.

20 Whereas, the standardized patients utilized on the
21 Step II CS would be entirely unfamiliar to him, as he
22 testified in speaking with strangers, his speech becomes much
23 more disfluent. So, there is really no comparison between
24 the exams in which he received double time several years ago
25 and the Step II CS exam, which is to be administered

1 presently.

2 (Pause.)

3 MR. WEINER: Furthermore, your Honor, Mr. Hartman
4 has established that the Text To Speech is effective. He
5 testified at allows him to feel more relaxed, knowing there
6 is an auxiliary aid that allows him to get through a long
7 block. He indicated that it would likely put the patient at
8 ease, because it wouldn't put them on edge when dealing with
9 one of the blocks that he encounters. Furthermore, your
10 Honor, it provides no advantage, whatsoever, to Mr. Hartman
11 when compared to other test takers.

12 One thing I'd like to bring to your Honor's
13 attention, is on February 4th, a California District Court
14 granted a preliminary injunction for a plaintiff who sued the
15 National Conference of Bar Examiners for certain
16 accommodations. I'm going to hand up a copy of the opinion
17 to your Honor and provide one to opposing counsel.

18 The case recently decided is Enyart (ph) versus the
19 National Conference of Bar Examiners. And the considered
20 issues of preferred accommodations that Ms. Leopold-Leventhal
21 had mentioned to you the other day. And it considered the
22 same issues that your Honor will be faced with in terms of,
23 with the exception of fundamental alteration, it dealt with
24 many of the same issues such as irreparable harm and the
25 balancing of equities, as well as the public interest. So,

1 this is an opinion which is very current and discusses many
2 of the issues that your Honor will be faced with.

3 THE COURT: I'm sorry, did you say it does not
4 address questions of fundamental alteration?

5 MR. WEINER: No, it does not, your Honor. In the
6 Enyart case, plaintiff who has a vision impairment received
7 accommodations which he was in law school, as well as
8 previously, which were similar or the same type of
9 accommodations that were approved by the National Conference
10 of Bar Examiners. She was looking for an additional or an
11 enhanced accommodation that reflected a more modern
12 technology for her to use when taking the bar examination.
13 The court reviewed her prior accommodations and found that
14 because of the differences, that those accommodations can't
15 be -- those accommodations are not appropriate accommodations
16 and that the accommodations that they were requesting in that
17 case were the appropriate accommodations.

18 With respect to the fundamental alteration, once
19 plaintiff has established a prima facia case, the burden then
20 shifts to defendant to either provide the accommodation or
21 prove that the accommodation creates a fundamental
22 alteration.

23 The only section or sub-component of this exam that
24 defendant can honestly claim a fundamental alteration to is
25 the SEP. We have provided in defendant's answers to

1 plaintiff's interrogatories, which is contained under Tab 32,
2 the answers in four and five. Those interrogatories indicate
3 that only the SEP is being affected or that they are claiming
4 is being fundamentally altered. So, accordingly, the
5 speaking is not a required part of either the CIS or ICE
6 component. I would like to note that the SEP, historically,
7 the experience or pass rate on this exam for American
8 students is 100 percent.

9 The cases involving fundamental alterations have
10 either involved a plaintiff's request to change the manner in
11 which the exam is scored or that the plaintiff has requested
12 the entire elimination of a particular section on the exam.
13 Mr. Hartman is not requesting that the score be altered with
14 the use of Text To Speech. Nor is he requesting that the SEP
15 component be removed as a section on which he can be assessed
16 on. We believe that Mr. Hartman can be assessed. You heard
17 him speak here for roughly ten to 12 hours, your Honor.
18 Certainly it can be determined that he speaks English.

19 We believe that the testimony of Dr. Clauser and Dr.
20 Katzakaras with, where they say it minimizes the sample,
21 there is no amount of speech that is required on this
22 particular exam. There is no threshold, there is no minimum.
23 If one speaks a lot, if one speaks a little, one can be
24 assessed. If Mr. Hartman is utilized -- is speaking and
25 utilizes on an occasional basis, the Text To Speech,

1 certainly the standardized patient can assess that. I had
2 asked Dr. Clauser how detailed are the assessments or
3 numerical value that these standardized patients place on the
4 SEP portion and it's just one overall score. So, when Dr.
5 Clauser talks about that it's these transitions that are
6 important, I don't believe that that's the case, your Honor.
7 I think it seems a bit contrived and over intellectualizing
8 what it is these SEPs are doing. It's merely a matter of
9 them of understanding whether or not the person is speaking
10 clearly and whether or not it is the ease at which they have
11 to deal with the examinee being tested.

12 I'd also like to note that --

13 THE COURT: I guess I have to ask you precisely what
14 is the request that you make on Mr. Hartman's behalf? As I
15 understand it, the focus is to authorize Mr. Hartman to use
16 the Text To Speech mechanism intermittently. And then is
17 there -- your contention is that and the scoring process not
18 be affected.

19 MR. WEINER: We're not asking that the scoring
20 process be affected. We believe that the standardized
21 patients will be assess his spoken English proficiency,
22 because he will, indeed, be speaking. Just as we observed
23 him in court, he spoke, he utilized his Text To Speech. I
24 think we all can assess and determine that Mr. Hartman does,
25 indeed, speak English and when he does, it's clear.

1 THE COURT: Am I not right that to the extent that
2 this morning we were able to get the committee's assessment
3 of all of this -- a combined committee, is that what it's
4 called?

5 MR. WEINER: I'm sorry, your Honor?

6 THE COURT: Is it combined committee?

7 MR. WEINER: Composite committee.

8 THE COURT: Oh, composite committee. The composite
9 committee thought that the use of auxiliary aids of one sort
10 or another, could well be found to be appropriate, but that
11 the report of the examination should state that the
12 accommodation of whatever sort was utilized and that that
13 report also should be noted on the transcript by which, I
14 suppose, I mean the student transcript.

15 Now, are you taking exception to that?

16 MR. WEINER: No, I'm not, your Honor. That
17 particular determination in terms of the report was really
18 referring to use of two way sign language. So, in the
19 context of signing, here is an individual and it would appear
20 that moving forward, that the NBME would view it the same way
21 in light of the composite committee's recommendation, that
22 with a two way sign language, that individual is not speaking
23 at all. So, the SEP is not being assessed at all. They will
24 receive the score for the CIS and the ICE portion and their
25 score would be marked to indicate the nature of their

1 accommodation. We feel that that would be appropriate with
2 Mr. Hartman, as well. We feel though, that they can and
3 should be able to assess his spoken English proficiency.

4 THE COURT: Well, when the composite committee says,
5 as I understand it to say, you tell me if I've got it wrong,
6 that the report should note the conditions under which the
7 examination was taken, but should not designate a pass or
8 fail with respect to that component.

9 MR. WEINER: If the person isn't speaking, I think
10 that that's what the composite committee had determined.
11 That was with respect to a person who was using exclusively
12 sign language. So, that's correct. But the person would
13 receive a pass or fail on the CIS and ICE sub-components.

14 THE COURT: So, you think the consensus with respect
15 to the non-assessment relates -- the non-assessment
16 accompanied by a report of the accommodation, relates for our
17 purposes, only to the signing accommodation?

18 MR. WEINER: No, your Honor, I think it certainly
19 would be appropriate if your Honor would enter an order
20 granting the accommodation that NBME can identify the type of
21 accommodation that Mr. Hartman receives.

22 THE COURT: But one step further and here I'm not
23 sure that I know your position. Would you quarrel with the
24 conclusion, if it were the conclusion, that the report should
25 be made, as it is, descriptively of how the examination

1 should be -- was taken, but should not report a result of
2 passing or failing with respect to that aspect?

3 MR. WEINER: If I understand your Honor's question,
4 are you asking whether if Mr. Hartman were to take -- be
5 granted use of Text To Speech, that he would be scored on the
6 CIS and ICE portion, but not the SEP and his report would
7 reflect that?

8 THE COURT: That's what I'm asking now.

9 MR. WEINER: I think that's certainly an alternative
10 that your Honor can order. I believe that, you know, my
11 first line argument is I believe they can assess his spoken
12 English proficiency, so they don't need to go there. But if,
13 for example, the standardized patients determined that they
14 were unable, for whatever reason, to assess his spoken
15 English proficiency, then that would be the result, your
16 Honor, that he not be scored and that be reported
17 accordingly.

18 THE COURT: At least, a part of my question suggests
19 that your assessment of how an examination should be graded,
20 may have very solid grounding in common sense. And assume
21 for purposes of discussion, that I would agree with you,
22 instinctively, that one ought to be able to measure spoken
23 English proficiency rather simply. But the board supported,
24 we'll say, by the composite committee, they feel otherwise.
25 And I suppose, at that point, the question arises whether a

1 Court, in determining what is a reasonable accommodation, is
2 in a position to override the test giver's assessment of how
3 to measure the results.

4 MR. WEINER: I think the Court is empowered to do
5 that, because the Americans with Disabilities Act, as one of
6 its goals, is to end discrimination. If the composite
7 committee is discriminating against a class of citizens and
8 in this case, individuals who have speech impairments, then
9 the Court is empowered to, by virtue of its -- by virtue of
10 the Americans with Disabilities Act.

11 THE COURT: All right.

12 MR. WEINER: The next step of the -- or the next
13 prong, in analyzing whether or not to grant a preliminary
14 injunction, is to determine whether there is irreparable
15 harm. Mr. Hartman has clearly showed irreparable harm if the
16 injunction is not granted. He won't graduate. He'll have to
17 re-enroll, that's at a cost of \$25,000. He'll lose out on
18 all his efforts in studying. Not only all the efforts of
19 studying throughout the four years of medical school, but all
20 the efforts he had put into studying for this particular
21 examination. He'll be denied a residency, as well as the
22 stigma and the impact associated with that particular
23 failure.

24 THE COURT: Are we talking about denial or delay?

25 MR. WEINER: Your Honor, it could be both, because

1 there is no guarantee that, let's say for example, Mr.
2 Hartman were to fail a second time. Clearly he will not get
3 into his residency this year. And there's a serious question
4 whether or not he would ever be able to get into one after
5 that. He would have to demonstrate his qualifications and he
6 would be in a class of a new set of students. The purpose of
7 the match is to match the medical students that are currently
8 enrolled. So --

9 THE COURT: Don't --

10 MR. WEINER: -- it could be a denial. I would
11 think, I think there's really no difference. I think a delay
12 of this nature, I mean, this is employment, this isn't just a
13 small delay, but it could be a delay of employment or it
14 could be a total denial of employment. But one of this
15 nature, I think, rises to the level of irreparable harm.

16 THE COURT: Is it your understanding, does the
17 record tell us this, if it be the case that Mr. Hartman can
18 take the examination on Wednesday of this week. If it be the
19 case that the examination can't be graded until April 21,
20 because the grading requires an assessment of Mr. Hartman's
21 examination together with whatever it is, the 80 or 200 or 40
22 others taking the examination within a two month period. Is
23 it your understanding that the residency opportunity is
24 foreclosed or is it your understanding that the matching on
25 March 19th is a process that's independent of any assurance,

1 one way or another, that an applicant has demonstrated what's
2 needed to graduate from medical school and to go forward.
3 I'm not now asking whether those who are determining
4 residencies, condition acceptance into the residency on the
5 taking of the examination and a showing of some demonstration
6 of satisfaction with the examination. I'm really asking a
7 question of timing. Are you contending that the
8 determinations of match on March 18th, if that's the date,
9 require that as of that date, that there's evidence of a
10 successful achievement on the examination?

11 MR. WEINER: I think there are, perhaps, two
12 distinct analyses to look at and what it is, is the match
13 occurs and one is matched with a residency. The residency,
14 according to Mr. Hartman's testimony, has their own
15 requirements. So, for example, three e-mails were presented
16 as to what was required and the requirement of those
17 particular residencies and we don't know whether or not
18 they'll be accepted in any of those residencies. But that
19 there be a pass of the Step II CS. It's not clear whether
20 they want to see that pass before the match or before Mr.
21 Hartman would start his residency. That wasn't made clear in
22 those e-mails, but just that he passed the Step II CS prior
23 to the initiation of that residency.

24 It may be, though, certain residency programs do
25 require a pass before the match and in fact, while not

1 presented as evidence in this case, there was one residency
2 program that required a pass on the first attempt of the CS.
3 Since that didn't occur, that was not need to present that as
4 evidence. So, different programs require different issue in
5 the field of their various residency programs, but we believe
6 that he would be precluded from certain residency programs if
7 a score was not presented before March 18th. Some residency
8 programs, he may --

9 THE COURT: I'm not clear the record thus far tells
10 us clearly one way or another. And for example, doesn't tell
11 us what the answer is with respect to any of the, is it nine
12 potential residencies in pathology that Mr. Hartman has been
13 interviewed with respect to?

14 MR. WEINER: No, your Honor, we've presented three
15 e-mails from residencies that Mr. Hartman had shown interest
16 in and they indicated that the Step II CS must be passed
17 before commencement of his program.

18 THE COURT: Before commencement of the program, yes.

19 MR. WEINER: Yes, in terms of --

20 THE COURT: But before the matching process takes
21 place?

22 MR. WEINER: Not from those particular -- not from
23 those particular programs. They're not -- they haven't
24 stated one way or the other.

25 THE COURT: Well, that seems to me to go to a

1 degree, to the question of whether we're talking about, as
2 you would say denial, as I would suggest delay or the
3 possibility that there's not even a delay. If we assume that
4 Mr. Hartman were in a position to show by April 21st results
5 on the examination, which would satisfy the residencies
6 determination as to whether that's a satisfactory result for
7 its purposes. Am I making any sense?

8 MR. WEINER: Yes, your Honor, one of the concerns is
9 if, for example, Mr. Hartman were to take the exam again and
10 were to fail, at that point, he would be denied acceptance to
11 a residency, because he would not be able to retake the exam
12 again and receive a score prior to the start of that
13 residency, if he had to wait, for example, until April to
14 find out the results of that score, he would not be able to
15 take the exam again and receive a score before the start of
16 that residency program.

17 THE COURT: However, if he were to receive a passing
18 grade for the test or perhaps, in the alternative a passing
19 grade on two components and no verdict with respect to the
20 other one, since even the report that there was an
21 accommodation provided and what it was. If that information
22 is forthcoming by April 21st and then conveyed to wherever
23 the hospitals are that Mr. Hartman is interested in having a
24 residency at, he would not necessarily be precluded from
25 initiating a residency right away or whenever they begin, in

1 June or whatever.

2 MR. WEINER: I will admit, your Honor, if Mr.
3 Hartman passes, that there may be some residency programs
4 based on their particular requirements, which may allow him
5 to commence the residency if the passing score came out in
6 April.

7 THE COURT: All right, thank you.

8 MR. WEINER: With respect to irreparable harm, in
9 your Honor's review of the Enyart case, you will see that the
10 harm to that plaintiff, I think it was when assessing the
11 different harms, was less than the type of harm that Mr.
12 Hartman will experience. What occurred in the Enyart case,
13 the court found significant was the amount of time and
14 preparation that Ms. Enyart put into studying for the bar
15 examination would be lost and the stigma associated with
16 failing the exam. That's what was considered irreparable
17 harm and that's what moved the court, on that issue, to grant
18 the preliminary injunction.

19 THE COURT: Do we have any record that in the
20 framework that we're here discussing, in this case, there's a
21 stigma involved in not passing the examination?

22 MR. WEINER: No, Mr. Hartman had not testified about
23 the stigma, but he did testify concerning the amount of
24 effort that he has put in med school and the amount of effort
25 he has put in, in his preparation.

1 The third prong is the balancing of the equities.
2 That favors Mr. Hartman because the need to appropriately
3 accommodate Mr. Hartman's severe disability, coupled with the
4 irreparable harm he's suffer if the injunction is granted,
5 supports the need for this injunction. The equities in the
6 Enyart case, as well as other cases, in fact, there was a
7 case involving NBME which is the Rush versus NBME, where the
8 equities, the court found the equities favors the plaintiff
9 in those cases.

10 The evidence presented by NBME really came from Dr.
11 Katzafarakas and Dr. Katzafrakas is a very affable individual.
12 He made a very good appearance. But when, in his particular
13 field is that on -- that the equities favors NBME because
14 their report leads to licensing and that's simply not true,
15 your Honor. This is one examination, as Exhibit 25, which we
16 just presented to you, indicates. There are numerous steps
17 and even Dr. Katzafrakas testified to this, as well. There
18 are numerous steps to become a licensed physician. You must
19 pass Step I. You must pass Step II. So, yes, Step II CK,
20 Step III, you must complete a year of residency and then you
21 must also pass the different requirements of the various
22 states such as not having a criminal history and that you're
23 a person of strong moral character. These are the different
24 requirements. So, in terms of passing this one particular
25 examination, the scenario that Dr. Katzafrakas presented is

1 just simply non-existent in this case.

2 THE COURT: I must have missed something here, Mr.
3 Weiner. Maybe anyone should know this as a matter of general
4 awareness, sometimes called judicial notice. Are you saying
5 that somebody who is in a residency is not, at that point, or
6 at least, not necessarily admitted to practice? Doesn't
7 have licensure from whatever state it is that the residency
8 is occupied?

9 MR. WEINER: Well, I believe the letter that's been
10 presented to your Honor outlines what's required and it's a
11 year of residency before you can be licensed. The scenario
12 that I heard Dr. Katsafrakas present was that after passing
13 the various USMLE examinations and completing medical school,
14 one can go out, establish their own office, conduct
15 orthopaedic surgery or neuro-surgery, provided they're not
16 doing it in a hospital. And that's just really not the
17 reality of medical practice. The reality of medical
18 practice, it is as a long road involving multiple years of
19 education. Involving --

20 THE COURT: Your understanding is that, at least, as
21 a matter of general practice, if you have secured a residency
22 in internal medicine and that's going to take place at
23 Jefferson, for the first year of your residency at Jefferson,
24 if you're called doctor, it's only a courtesy statement, it's
25 not that you really are?

1 MR. WEINER: No, you are a doctor, you're just not,
2 you do not have your license. When you graduate medical
3 school, you receive the moniker of doctor.

4 THE COURT: So, you're practicing medicine without a
5 license, at that point?

6 MR. WEINER: I suppose that's, in terms of the
7 particular state licensing, when you're a resident, that's
8 correct.

9 THE COURT: All right, go ahead. Maybe it doesn't
10 matter for our purposes. All right, I've probably
11 interrupted you too often.

12 MR. WEINER: Finally, your Honor, the public
13 interest standard has been met here, as well. There have
14 been numerous cases where preliminary injunctions have been
15 granted against testing agencies, including the NBME. You
16 have the Enyart case before you. The purpose of the
17 Americans with Disabilities Act is to serve the strong public
18 interest of providing a clear and comprehensive national
19 mandate for the elimination of discrimination against
20 individuals with disabilities and to provide broad coverage
21 for individuals with disabilities.

22 Granting plaintiff's motion for a preliminary
23 injunction, the Court will be eliminating the type of
24 discrimination that Congress set forth to protect.

25 Your Honor, the Americans with Disabilities Act has

1 opened up to hundreds of people with disabilities, to
2 practice medicine. Such as Chris Norton who is an
3 individual, who is a licensed and board certified intern.
4 He's hearing impaired. On a daily basis, he communicates
5 with patients with the aid of a sign language interpreter.

6 Or Dr. Wainkel (ph), who is a licensed physician and
7 he's a physiatrist, which is involved in rehabilitative
8 medicine. He sees approximately 150 patients a month. The
9 ADA has helped improve the standards of medical care in the
10 country, by allowing hundreds of extremely talented,
11 intelligent people to enter medical school and practice
12 medicine.

13 THE COURT: Mr. Weiner, I don't want to make too
14 much of a point of it, you've introduced a couple of
15 important examples, but I don't think they're part of our
16 record.

17 MR. WEINER: No, your Honor, I'm just speaking more
18 in an anecdotal sense, that the ADA has been designed to
19 allow people with disabilities to practice medicine, smart,
20 intelligent people, such as Mr. Hartman. Mr. Hartman has now
21 has this -- the gates closed by defendant on moving forward
22 with this medical career. His medical school had determined
23 that he is a very, very competent individual. We have heard
24 a considerable amount of testimony regarding how well he did,
25 particularly, on clinical examinations. But that was at a

1 time when his speech was less impaired than it is now. And
2 we are requesting that he be given this particular
3 accommodation.

4 And your Honor, I suppose what I would like to
5 direct your attention to is the very first thing that
6 occurred when Mr. Hartman took the stand. He was asked to
7 say his name. And for three minutes, he experienced a block
8 and during that three-minute time period, your Honor, while
9 Mr. Hartman struggled to get out his name, I saw your Honor
10 stand up, walk over to the right side of your bench, pour
11 one, perhaps two cups of water. Walk over to the left side
12 of your bench and put those cups of water in front of Mr.
13 Hartman and comment that something humorous about you're just
14 a fellow who works here and pours the water. And then you
15 returned to your seat and sat down. And during that period
16 of time, Mr. Hartman was still unable to get out those words.

17 If that were to occur in the context of the CS
18 examination, imagine how difficult it would be for him to
19 conduct the rest of that examination. But if he were to
20 utilize Text To Speech and be allowed to get through that
21 small block of just saying his name, it would get him through
22 that part. He would speak more effectively, more
23 efficiently. He would put the patient at ease and they would
24 still be able to assess the manner in which he spoke,
25 particularly, this spoken English proficiency.

1 What we request, your Honor, in this preliminary
2 injunction is that Mr. Hartman be allowed to use the computer
3 or an electronic device with Text To Speech, to communicate
4 and to augment his spoken English during the patient
5 encounters. We ask for the additional 15 minutes for each
6 patient encounter that he's already been granted. That he be
7 given a face to face encounter instead of a telephone
8 encounter as he was previously granted. And to permit Mr.
9 Hartman to take the step to CS. Report the grade to Mr.
10 Hartman shortly after a test administration and that the exam
11 accommodations in scoring be executed with fidelity. Thank
12 you, your Honor.

13 THE COURT: All right, thank you. I think we've
14 gone a little longer than anticipated. And plaintiff's
15 argument, you tell me what you'd like to do. We can take a
16 luncheon recess and postpone your argument until the early
17 afternoon. Or we could, I suppose, drive ahead and complete
18 it now.

19 MS. LEOPOLD-LEVENTHAL: A lunch break is fine, your
20 Honor.

21 THE COURT: Pardon?

22 MS. LEOPOLD-LEVENTHAL: A lunch break is fine, your
23 Honor.

24 THE COURT: Lunch break is fine. All right, then
25 we'll -- it's 1:15, we'll resume at 2:00 o'clock then.

1 MS. LEOPOLD-LEVENTHAL: Thank you, your Honor.

2 MR. WEINER: Thank you, your Honor. 2:00 o'clock,
3 your Honor?

4 THE COURT: 2:00 o'clock.

5 (Court in recess 1:14 to 2:13 o'clock p.m.)

6 THE COURT: Please sit down. Welcome back to the
7 lectern.

8 MS. LEOPOLD-LEVENTHAL: Thank you, your Honor.

9 Thank you for your patience. A trial that was supposed to go
10 a day and a quarter is now winding up its fifth day, I think.
11 It's taken a lot longer than we all would have anticipated.
12 Thank you for your indulgence.

13 As I sat through the trial and especially, the
14 closing argument and thought about this case over the
15 weekend, it occurred to me that it's as though we are talking
16 about some sort of abstract, philosophical discussion that
17 really has no application in the real world. How will he do
18 if we give him this. How will he do if we give him this
19 accommodation.

20 The one aspect or feature or perhaps, component that
21 has been conspicuously absent from the plaintiff's case in
22 chief, is any reference to the public. This examination,
23 your Honor, was not created for Mr. Hartman. It wasn't even
24 created for all of the test takers who are going to embark
25 upon the Step II CS examination. The USMLE exam, including

1 Step II CS, was created to protect the public and you know,
2 the mention of the work public, it was hardly audible
3 throughout this entire trial. The USMLE has decided and is
4 continuously revising its examination to ensure that those
5 who graduate medical school and become medical doctors, have
6 the skills and knowledge and I know we use those words a lot,
7 but the report -- the skills and knowledge to be effective
8 medical doctors.

9 We're not talking about some abstract examination
10 that has no application in life. This examination, the Step
11 II CS exam and all of the other components, I, II CK and Step
12 III, are in place to make sure that the people who graduate
13 medical school have the skills to treat patients, to save
14 patients' lives, to address an emergency that might come up,
15 to be qualified in a particular field. And all I've heard in
16 the plaintiff's case in chief, really, is what can we do to
17 make sure Aaron gets over this hurdle. This isn't about
18 making sure Aaron gets over a hurdle and I don't mean to be
19 insensitive and I don't mean to be harsh. But this isn't a
20 case about sympathy, it's really not.

21 Do I feel badly that he spent four years in medical
22 school? I suppose so. I have children and I might feel
23 badly if they finished medical school and couldn't get their
24 license. But this trial and this test isn't about making
25 sure Mr. Hartman gets over this hurdle. This is about making

1 sure every test taker who gets over this hurdle, has the
2 skills and the competence to be doctors. And who is best
3 situated to evaluate and determine what the critical skills
4 are to become a doctor in the USMLE and the National Board of
5 Medical Examiners. And all of the committees that meet month
6 after month, year after year, decade after decade, revising
7 the examination, to make sure that they appreciate the
8 evolving skills that are necessary to become a medical
9 doctor. And rather than look at this in some sort of
10 abstract, philosophical way, let's talk about what this
11 really means in real life.

12 I heard Mr. Weiner say, in his closing argument,
13 that there was a two-minute delay and then a three-minute
14 delay in Mr. Hartman's stating his name. And Mr. Weiner said
15 to you, if that were to occur in the context of the exam, can
16 you imagine how much time that would have eaten up. Your
17 Honor, if that would happen in real life, can you imagine the
18 impact of that three-minute delay in an emergency room
19 setting, in a setting where Mr. Hartman is being called upon
20 to be a pathologist. And as Dr. Katzafrakas explained, a
21 pathologist isn't a mute, they're not never expected to
22 speak. They have encounters with nurses, doctors, patients.
23 Very frequently, a patient is under anesthesia and they are
24 doing a biopsy, let's say it's a breast biopsy, there's a
25 concern about breast cancer. They take a cut out of the

1 skin, they run it down to the pathologist, the pathologist
2 does a report, they run back up and they tell them what they
3 found and they could have to do that three, four, five or six
4 times. The last thing you want to do is keep that patient
5 under anesthesia for too long.

6 And so, my point is, we've been thinking about this
7 kind of out there, as if it has no real application. It does
8 have real world application and I, you know, I tried to look
9 over the course of the case and try to say to myself, now,
10 how is it that this young man got to this point, where he's
11 asking for the Text To Speech technology. And the first
12 thought that occurred to me was, in 27 years of his life, 27
13 years, he never used the Text To Speech device. Never, not
14 once. He always used his spoken English. Why would he want
15 to use it now? Because he's looking for the accommodation
16 that is going to ensure that he passes this examination.

17 Well, if we're looking for an accommodation that
18 ensures that he passes it, let's just throw the examination
19 out. I mean, what's the point of even having the exam if
20 we're going to give him alternatives. Well, let's try it
21 with time and a half, now we'll try double. If that doesn't
22 work, let's give it to him with the Text To Speech and
23 additional time. If that doesn't work, why don't we just let
24 him write the questions. Why? Because Dr. Katzafrakas spent
25 a good bit of his testimony explaining why this particular

1 exam, the Step II CS, is so important and he explained the
2 study that supported it and the years of development that
3 went into this examination. And part of his explanation was
4 this. Patients are more likely to follow the advice of their
5 doctors, do the diagnostic examinations that the doctor is
6 suggesting, take the medication that's being offered, do the
7 follow-up examinations and have a good rapport between the
8 doctor and the patient, if there is that rapport that's
9 developed. If there is an understandable dialogue between
10 them. If there isn't an understandable dialogue, then you
11 have the patient that's less likely to take the medicine,
12 less likely to go for the follow-up tests that they're
13 supposed to and less likely to follow up on that doctor's
14 advice.

15 So, they developed this examination because they
16 realized that rapport was a critical skill that medical
17 doctors needed to have and it wasn't subsumed within either
18 any of the written examinations for Step I, the Step II CK or
19 the Step III. So, they specifically evaluated those skills
20 and after years of development, they came up with this
21 particular examination. And I ask you, is it Mr. Weiner's
22 role to substitute his judgment for the committees of medical
23 doctors and health professionals who, for years, have
24 evaluated and developed this examination. He would suggest
25 that it is, because how did we get here after 27 years of

1 oral communication? Mr. Hartman failed the test. He spent
2 several years in medical school and he was looking for a way
3 to get over the hurdle.

4 So, rather than asking for additional time, which
5 seems to be discounted today, but I would remind you, Mr.
6 Hartman used additional time on eight examinations in medical
7 school and passed all eight of them with additional time. In
8 fact, on one of those examinations, he got time and a half.
9 The NBME is offering him double time. He took an examination
10 that was designed to mirror this exact test. Took it with
11 time and a half and he passed. When he submitted his
12 paperwork to the NBME and even in his Complaint and
13 declaration, he swore that he had only been given double
14 time. That's not true, he was given time and a half. But
15 even if you use the double time, that's not good enough.

16 So, Mr. Weiner said we have to come up with
17 something else. So, they had this orator. NBME rejected
18 that. Then the lawyer, not a doctor, not a speech
19 pathologist, not anyone experienced in speech disfluency,
20 called an engineer and there's testimony about that. What
21 can we do to help him? Well, how about this Text To Speech
22 device. That person never met Aaron Hartman. That person
23 doesn't know a thing about the U.S. medical licensing
24 examination. Mr. Weiner probably called and said, listen, we
25 need something that can help him get over this examination,

1 they're not accepting an orator. You're an engineer, you're
2 familiar with this equipment, have any ideas? And they put
3 it in their interrogatory responses. The first time they
4 came up with the Text To Speech device was because the
5 engineer suggested it to Mr. Weiner.

6 Then what happened? They don't have any expert
7 report to support it. Mr. Weiner writes a letter to the NBME
8 and says, okay, we have something new. Now we want you to
9 use the Text To Speech device. Not supported by any expert
10 report. They realize that. So, then Mr. Hartman takes that
11 device and goes and sees Dr. Tetnowski. And says to him, I'd
12 like you to recommend this device for me on the USMLE. And
13 individual who knows nothing about the examination. There's
14 nothing about the skills that its designed to assess. He's
15 there to evaluate the speech disfluency.

16 We are not disputing that Mr. Hartman is disabled.
17 He didn't put an expert on and I, you know, for the purposes
18 of this trial, we accept all of Dr. Tetnowski's testimony
19 with respect to the severity of Mr. Hartman's speech
20 disfluence. So, what happened? He takes the device to Dr.
21 Tetnowski and says, Dr. Tetnowski, I'd like you to make a
22 recommendation that I be permitted to use this on the
23 examination. And what does Dr. Tetnowski do? Does he say to
24 Mr. Hartman, well, gee, how have you functioned before this?
25 Didn't you have to take oral exams in medical school? What

1 kind of accommodations did they give you there? Were the
2 examinations similar? You must have had a lot of, in your
3 rotations, a lot of oral communication with the patients and
4 doctors? No. He doesn't ask for a thing and Mr. Hartman
5 doesn't offer it. He ignores 27 years of his life. He spent
6 six hours with Mr. Hartman and based on that six hour
7 evaluation, he says, okay, I'm recommending the Text To
8 Speech. So, now he's discounted Mr. Hartman's entire life.
9 He knows nothing about the examination, but he's going to
10 redesign our examination and substitute his opinion for that
11 of the medical doctors who have developed it.

12 And Dr. Tetnowski says something else. When I asked
13 him, why didn't you look at those sources and he said and he
14 was candid about it. He said, you know, in retrospect, I
15 would have liked to have seen all that, but the truth is, I
16 didn't really want to see what happened before, because I'm
17 looking at a slice in time. I want to look at this one day,
18 I doesn't matter to me how Mr. Hartman functioned in grade
19 school or how he did in college or even how he did on similar
20 medical examinations. This is a variable disease and I want
21 to see how Mr. Hartman functioned on this day and I don't
22 want to be tainted by what happened before it, because it's
23 not predictive.

24 Okay, let's accept that premise for a moment. Then
25 what value is Dr. Tetnowski's report and evaluation that he

1 conducted on December 7th, what value does that have in
2 January, February, March, June? He's the one who said
3 variability is a key factor in evaluating people with speech
4 disfluencies. So, he's telling us he ignores everything in
5 favor of one day, because none of the rest of it's
6 predictive. Well, how predictive is what he's saying on that
7 one day, for the next six months or the next year.

8 And what's very interesting about Dr. Tetnowski's
9 testimony is that I asked him, at his deposition, what
10 accommodation do you think Mr. Hartman should get? And Dr.
11 Tetnowski said, whatever accommodation "best assures his
12 success". I would submit to you that that's not the
13 standard. The standard is what's reasonable, not what best
14 assures his success. I made probably the typical mistake a
15 first-year lawyer would make when I took his deposition and I
16 actually, instead of just leaving that there, I said, what do
17 you mean by best assures his success? I shouldn't have said
18 anything, but I asked him. And the next thing he said is, I
19 think we should give Mr. Hartman everything he needs to be
20 successful. Everything he needs to be successful? Let's
21 just throw out the test then, because, basically what you're
22 saying is, we're going to keep trying different options and
23 if none of those options work, we'll keep trying another one
24 until he gets over the hurdle. Forget it, just throw the
25 hurdle out and just give him his medical license.

1 What's also interesting is that Mr. Hartman was
2 honest and he said he'd never used the Text To Speech device
3 in any patient encounters other than in three this fall.
4 Now, I'm not debating Mr. Hartman's -- the severity of his
5 speech disfluency, however, I think it is very important to
6 point out that all during this entire time period, when Mr.
7 Hartman is claiming that his speech disfluency is at its most
8 severe, he participates in eight, out of nine, residency
9 interviews. Each one including a panel of medical doctors,
10 who are interviewing him and in probably not a very
11 comfortable setting. And he chooses to use his Text To
12 Speech device in one out of nine. Why would he do that? His
13 own attorney, today, said when he meets with strangers, his
14 disfluency gets much worse. Why didn't he use the device?
15 He didn't use the device because he knew he could get over
16 those interviews without using it. He knew that he could
17 communicate in an understandable fashion. Albeit, not
18 perfect. I'm not suggesting he has perfect speech, but he,
19 himself, decided not to use that device in those interviews.
20 And I suggest to you that if he's allowed to use this Text To
21 Speech device on this examination, he's going to use it on
22 one day and after that, he's going to go out into the medical
23 profession and he's never going to use it again.

24 THE COURT: What's the rationale for providing him
25 with more time when it's ordinarily stipulated for double

1 time on the examination?

2 MS. LEOPOLD-LEVENTHAL: Good question. The
3 committee that evaluates what an appropriate accommodation is
4 and whether a certain accommodation fundamentally alters the
5 examination where another one doesn't, considered more time.
6 And they've decided that time and a half or double doesn't
7 necessarily -- doesn't fundamentally alter that exchange.
8 So, when you go in for a doctor/patient encounter, it could
9 last 30 minutes and that's not really unreasonable. We've
10 all been to doctors and specialists where the initial
11 encounter might last that long. They have decided, however,
12 that any longer than that no longer represents an accurate
13 depiction of the doctor/patient encounter. So, their
14 rationale is they're trying to be fair and they realize that
15 everyone doesn't talk at the exact same speed. And there
16 have been, you know, five or six other test takers who have
17 stuttered and they didn't want to shut them out by saying,
18 well, you don't speak as quickly as he or she does, so,
19 you're out. So, they met and they discussed and they agreed
20 that by providing more time, that's a reasonable
21 accommodation. That doesn't alter the skills. And that's
22 really what's at the crux of this analysis. They're decision
23 to give more time is reasonable because it doesn't take the
24 spoken part out of the encounter.

25 Mr. Weiner tried to draw distinctions between oral

1 and verbal and written and non-written communication. The
2 third component is called spoken English proficiency. I
3 can't imagine anything that alters that more than taking away
4 the spoken part. So, we have Mr. Hartman, who, for all
5 intents and purposes, probably never intends to use this
6 device again. But let's say he does. What did Dr.
7 Katzafrakas tell us? He told us that Mr. Hartman will
8 receive an undifferentiated medical license, that's a general
9 medical license. He could become a surgeon, he could be a
10 pediatric doctor, he could become an oncologist. He could do
11 anything he wants.

12 You ask Dr. Katzafrakas questions with respect to,
13 well, I mean, is really going to be board certified? Is a
14 hospital going to accept him? And truthfully, the answers
15 are no, he's not going to be board certified unless he has a
16 residency and passes the examinations. And he probably won't
17 be admitted into a hospital to be surgeon, to the extent that
18 he hasn't completed a residency. But he will have the
19 license that will allow him to practice any type of medicine
20 he wants and I, you know, you try to envision in your mind,
21 how is the Text To Speech device going to work in just a
22 basic medical examination where you have to hold equipment?
23 I mean, you're holding, you know, an arm cuff to take
24 somebody's blood pressure, you're examining their knee.
25 There's all kinds of medical equipment. Certainly, in

1 surgery, there's, you know, a whole more equipment. How is
2 it that you're going to manage a Text To Speech device, which
3 requires two hands to type and also the equipment, at the
4 same time, going back and forth between the two?

5 And I think the point is that the plaintiff is
6 looking for whatever accommodation it is that best assures
7 his success, whether or not it bears any relationship, at
8 all, to the practice of medicine. He views this as a hurdle
9 that he has to overcome and once he is able to do that, he's
10 not gotten his license and his, you know, ability to speak or
11 speak rapidly or speak clearly really are irrelevant. And
12 you know, one thing the Court has to consider is even if the
13 NBME was ordered to give Mr. Hartman this examination and
14 ignore the spoken English proficiency portion, okay, he
15 doesn't get a score in that. Now, he has -- he doesn't have
16 a pass, what he has is a pass for those two sections.

17 Now, what needs to happen is, because Exhibit P-25,
18 the Stoney Brook Medical Center confirmed that they required
19 a pass of a Step II CS in order to graduate Mr. Hartman. So,
20 what happens? He passes the test without the SEP. Now, the
21 Court has to order Stoney Brook to accept that examination
22 and that score and ignore the SEP component. Okay, let's say
23 Stoney Brook agrees to do that. Now, we have to go to the
24 state licensing board and Mr. Hartman has to ask you to order
25 the state licensing board, ignore that he didn't pass the SEP

1 component, I'm ordering you to accept this Step II CS score,
2 even though it's not a passing score. And then --

3 THE COURT: Why do I have to go through all of these
4 postscripts? I'm not clear.

5 MS. LEOPOLD-LEVENTHAL: Ordering that the NBME give
6 Mr. Hartman the examination without the SEP component isn't
7 the end of the day. All that says now is he's passed two of
8 the sections, hasn't even been evaluated on the third and
9 according to Stoney Brook, he can't graduate from medical
10 school. I'm not saying you have to do that, but I'm saying
11 if he wants to practice medicine, he's going to need waivers
12 from all these institutions, waivers of the exact skill that
13 this test is designed to assess. So, now, they're going to
14 say, well, we're waiving the English proficiency portion.
15 We're waiving, you know, the communication part. We're just
16 going to waive it and let you become a doctor.

17 THE COURT: Well, is that, in a framework which
18 involves the use of the TTS intermittently, it would appear
19 to be substantial opportunities then for the patient, those
20 doing the observation and testing, to score -- to measure the
21 spoken language, right?

22 MS. LEOPOLD-LEVENTHAL: I'm not sure I understood
23 your question, I'm sorry.

24 THE COURT: The request, as I understand it, is for
25 the opportunity to use the Text To Speech device

1 intermittently in the examination. Not preclusive of any
2 conversation orally, but at various intervals, however to be
3 determined. In between such intervals, Mr. Hartman would be
4 undertaking to speak very slowly, to be sure, but undertaking
5 to speak and those who he is interviewing can make -- well,
6 it's not a very hard determination to make, as to whether
7 they're with a person who speaks English intelligently. Why
8 doesn't that accomplish the goal of ascertaining whether the
9 person can speak English in an adequate fashion?

10 MS. LEOPOLD-LEVENTHAL: There are number of flaws in
11 the question and I'm sorry for putting it that way. But
12 first of all, we don't know how much Mr. Hartman is going to
13 speak. That's answer number one. And Mr. Weiner has told
14 you that when he approaches strangers, his speech disfluency
15 is much worse. When he is in a stressful situation, that
16 again, exacerbates the stuttering condition. So, now you put
17 him in a standardized patient encounter and as Dr. Clauser
18 explained, there's even heightened anxiety and stress because
19 you have a patient who's presenting, you have a limited
20 amount of time to interact with them, ascertain what their
21 problem is, answer their questions. I mean, you might have a
22 standardized patient saying, Doctor, am I going to die? I
23 mean, it is an encounter that is fraught with anxiety. So,
24 then the question becomes, well, how much is he really going
25 to speak during that encounter and what percentage is enough

1 to then evaluate him.

2 And truthfully, your Honor, Dr. Clauser gave very
3 clear and uncontroverted testimony that made a lot of sense.
4 How much do they need? They need 100 percent of it. There
5 was a comparison between Mr. Hartman and other test takers
6 and the question was asked, well, if these test takers talk
7 just a little bit and Mr. Hartman's Text To Speech talk is
8 more than those, haven't the standardized patients been given
9 a big enough sample. Can't they evaluate his spoken English
10 proficiency on that? And the answer is no.

11 Psychometrically, you're not able to pull out
12 portions of it. I mean, can you predict whether in one
13 encounter he'll speak the whole time and another encounter,
14 he'll use the Text To Speech? If that happens, the second
15 standardized patient can't evaluate him at all. Then you
16 have, you've introduced the Text To Speech, which is a
17 computerized voice. It can be inaudible at times. Sometimes
18 it runs the words together. If that happens, is Mr. Hartman
19 then marked down because his spoken English is a little less
20 clear, a little more difficult to understand. How does one
21 evaluate the spoken English of a computer voice? You can't.
22 And that's why the examination is called spoken, it's not
23 called typed.

24 And also, one other point, Dr. Clauser explained
25 that there is a difference between a written English

1 proficiency and spoken. And in fact, the Step III exam
2 evaluates written answers. The Step II exam is not designed
3 to evaluate written answers and Dr. Clauser testified that
4 written English is different than oral English. But my
5 answer to you is, how do we control that? How do we know
6 what's a big enough sample? Haven't we fundamentally altered
7 now, the entire exchange, that it no longer represents what
8 is a normal doctor/patient encounter?

9 And you know, this isn't the first court that's
10 going to be addressing the fundamental alteration question.
11 Mr. Weiner brought out a case that was decided about a month
12 ago and actually, that case didn't even address fundamental
13 alteration. But there are a number of instructive tools and
14 decisions that the NBME cited in its brief, that provide, you
15 know, a tremendous amount of guidance as to what the phrase,
16 fundamental alteration, means.

17 The Department of Justice provided, I think, some
18 very tangible examples. An individual who suffers from
19 dyscalculia, which is a learning disability in mathematics,
20 they're not entitled to use a calculator on that test to
21 measure math skills when the math skills are what is being
22 assessed. Quoted directly from the Department of Justice's
23 manual, "If a test is designed to measure the ability to read
24 written material, it's entirely proper for that exam to be
25 administered in a written form, to an individual with a

1 vision impairment." They're impaired, they're disabled. No
2 one is disputing that. But when the test examines the
3 ability to read, unfortunately, that person's impairment
4 affects that and to change that construct, would
5 fundamentally alter that examination.

6 There are a number of cases that we cite in the
7 brief, as well, that address exactly those situations where
8 the skill that is being assessed is the exact skill that the
9 plaintiff is asking the Court to order the testing agency
10 alter and change, just so that that particular individual can
11 get over that hurdle of that examination. You know, we're
12 not talking about an exam to license a CPA or a realtor.
13 We're talking about an examination that is effectively going
14 to give Mr. Hartman a license to treat patients for the rest
15 of his life.

16 It, first of all, is not the kind of case where
17 mandatory injunctive relief is appropriate. What do we do if
18 we've given Mr. Hartman the opportunity to take the test,
19 with the Text To Speech device, doesn't have a SEP component.
20 He passes, he gets out in his residency and then they decide
21 no, it shouldn't have been an injunction, we're going to
22 reverse that. How is it that you go and un-ring that bell
23 once Mr. Hartman is now out in the field treating patients?

24 THE COURT: I guess, at this point, I'm not quite
25 clear what you mean. Are you suggesting that there's no

1 effective review in the Appellate Court of an injunction to
2 which one objects, is that your thoughts?

3 MS. LEOPOLD-LEVENTHAL: No, what I'm suggesting is
4 that once he has his medical license and is out treating
5 patients, let's say, he gets in a situation where clear rapid
6 speech is a problem and someone is injured, someone dies as a
7 result of his inability to communicate. Now, the case is on
8 appeal, it gets reversed. How do we take that position back?
9 I mean, there are, candidly, certain jobs where clear,
10 somewhat rapid speech is important. You have a 911 operator,
11 9-1-1. Emergency medical technicians, fire fighters, pilot,
12 these are all individuals where rapid, clear communication is
13 important. I certainly wouldn't want the pilot of my
14 airplane to have a severe stutter so severe, that he or she
15 couldn't communicate with the control tower.

16 And it's sad, but true, I mean, people have
17 disabilities that might prevent them from entering a
18 particular field. You have a young man who is born with one
19 leg and he wants to be, you know, the Phillies short stop.
20 Unfortunately, he has a disability and he's not going to be
21 able to perform that job. However, Dr. Katzafrakas had a lot
22 of examples of physicians in the medical field that would be
23 perfect for Mr. Hartman. He could be a research pathologist.
24 He could do exactly the same kind of thing that he would like
25 to do without having the patient interaction. Then every

1 concern is addressed. He doesn't have to worry about passing
2 this examination. He doesn't have to worry about rapid
3 speech. He can still be a scientist, a pathologist, as he
4 would like. But we're not putting him in a position where
5 people's lives are at risk.

6 And you know, this isn't an examination that just
7 came into fruition this year. This was in place in 2004.
8 Mr. Hartman, who has had a speech disfluency his whole life,
9 has known that he would have to encounter and pass this
10 examination in order to achieve his medical license. And to
11 give him, you know, a leg up or an excuse, because he has now
12 invested four years in medical school, really doesn't
13 appreciate the patients that he's going to be treating. I
14 mean, Mr. Weiner suggested that the NBME is the gatekeeper.
15 They are the gatekeeper and I want them keeping the gate. Is
16 this examination rigorous? Absolutely. I have two children.
17 If they're in the emergency room, one of them, I want a
18 doctor, I want the best doctor there and I want the doctor
19 who can communicate in a clear, meaningful way to give my
20 child or whomever else is on the table, the best chance of
21 surviving that encounter. And it doesn't have to be in the
22 emergency room setting. My point is --

23 THE COURT: Is that a mistake for Stoney Brook to
24 admit Mr. Hartman?

25 MS. LEOPOLD-LEVENTHAL: What I think happened, your

1 Honor, is that Mr. Hartman's speech disfluency has become far
2 more severe as time has gone on. Do I think it was a
3 mistake? I don't know if they provided him with an
4 interview. I would assume that they did. But perhaps his
5 speech disfluency was much less severe. I think the evidence
6 would establish that over almost four years of medical school
7 it was moderate. We have evidence from Mr. Hartman's own
8 speech pathologist suggesting that it was just a moderate
9 speech disfluency. And it was probably moderate throughout
10 medical school. Do I think it was a mistake? I don't know.

11 What I do think is that Mr. Hartman has made the
12 decision not to try to take the examination with double time.
13 He was offered that opportunity in September. Now, five
14 months later and he's chosen to delay his own entrance into a
15 residency program. He's chosen not to try to take the test
16 with the exact same or better accommodation than he was given
17 in medical school. And he's chosen to do that, I think,
18 because he wants some sort of guarantee that when he takes
19 the examination, he's going to pass it and he's come to this
20 Court and he's saying, give me a guarantee. Give me the
21 accommodation that best assures that I'll complete this exam
22 and that your Honor is allowing me to type, rather than
23 forcing me to speak.

24 His choice not to take it is a little hard to
25 explain. Stoney Brook would allow him to take the test three

1 times. He's only taken it once. Why didn't he try to take
2 the examination with the double time and then if he failed, I
3 guess arguably, he could come to court and we might be having
4 the same debate. A few issues would be excised from that
5 debate, but you know, he's chosen to delay his entrance into
6 the residency program by not even trying to utilize the
7 accommodation that he requested from the NBME. Let's not
8 forget, when he first approached the NBME, he asked for
9 double time. He asked for the exact accommodation that he's
10 being offered now and has elected not to do so.

11 I would address the irreparable harm issue, but you
12 know, I don't think that the plaintiff has made out the case.
13 They've talked about some sort of stigma and some sort of
14 delay in entering the profession and there might be an
15 additional monetary cost. All of those, there are lots and
16 lots of cases that have addressed whether or not those
17 particular allegations, even if proven, would establish
18 irreparable harm and frankly, they don't.

19 And this brings me around to my conclusion, which is
20 basically, where I began. We're not talking about something
21 in the abstract here. We're not talking about allowing Mr.
22 Hartman to get over this hurdle. A hurdle which will then be
23 totally irrelevant in the medical profession. This is a
24 hurdle and a skill that is critical to the medical
25 profession. Is it fair that Mr. Hartman was born with a

1 speech disfluency? No, it's not fair. It's not fair that he
2 has a disability and I'm sad for him. He has a whole lot of
3 other attributes, though. He graduated under-grad with a
4 3.9. He's done extremely well in medical school. He could
5 be, among other professions, a research pathologist. There
6 are all kinds of other professions that he could pursue in
7 the medical field, not as a medical doctor.

8 But to come to this Court and ask you to help him
9 get over a hurdle, so he can now enter the medical profession
10 and treat patients who are relying on the NBME as the
11 gatekeeper. Relying on the NBME to give a rigorous
12 examination, because, let's face it, everybody in this
13 courtroom wants to make sure that when they have a trauma or
14 a family member of theirs has a serious medical condition,
15 that the person who is treating them has passed every step
16 that they're required to pass and has shown competency in
17 each one of those examinations. We certainly wouldn't want
18 the person treating our wife or our husband or our children,
19 to have been given an accommodation that so alters the test,
20 that it's no longer recognizable. And it no longer assesses
21 the skills that these medical doctors have determined are
22 fundamental to becoming a medical doctor. Thank you.

23 THE COURT: Thank you. Mr. Weiner, is there a
24 response you'd like to make?

25 MR. WEINER: I'll be very brief, your Honor, yes.

1 THE COURT: All right.

2 MR. WEINER: Thank you, your Honor. Defendant's
3 counsel would like you to believe that if you grant this
4 injunction, you are giving Mr. Hartman a license. You
5 aren't. You grant this injunction, you are allowing Mr.
6 Hartman to take this exam with an accommodation. He must
7 still test, he must still pass, he must still demonstrate the
8 proficiencies in the various areas that this exam is looking
9 for. This isn't a free ride. This isn't an advantage. In
10 fact, there has been no testimony whatsoever, that this
11 accommodation provides him with an advantage. I can't
12 imagine that it does. No one has ever asked for it. I'm
13 sure that if Mr. Hartman had fluent speech, even a little bit
14 better than what he has now, he would much prefer to be able
15 to speak the entire time, than to utilize this Text To
16 Speech.

17 And even assuming that somehow this accommodation
18 gave him a leg up, it doesn't given him a license. As the
19 exhibit that I presented to you last, your Honor, presents,
20 there is a whole slew of steps, a whole slew of hurdles that
21 an individual must go through in order to become licensed.
22 We are merely asking that Mr. Hartman be given an opportunity
23 to be put on an even or level playing field. I don't even
24 think the Text To Speech levels the playing field. But it
25 levels the playing field more than just allowing him to speak

1 in the way he does.

2 One of the things that -- and this came from Dr.
3 Katzafrakas, he stated is that I can't imagine a physician
4 going into an office and holding this laptop computer and
5 being able to use a stethoscope or an ophthalmoscope or
6 whatever instrument. Your Honor, one of the tenets that Dr.
7 Katzafrakas talked about was being updated with the various
8 systems that are involved in medicine. I've been to the
9 doctor plenty of time. I have children who go to the doctor.

10 Every doctor I've been to these days, either has a
11 computer in the exam room or they bring in a laptop and they
12 do a whole slew of things with their laptop. They take
13 notes. The order the prescriptions for you, utilizing their
14 computer. They provide you with instructions regarding
15 post-wound care or post-operative care. There are a whole
16 number of things that physicians are doing utilizing
17 computers. THE COURT: I don't think the defendant's
18 position involves any condemnation of computers for a whole
19 array of other settings. I think we do know that it's a
20 common piece of the furniture now in the doctor's office to
21 have a computer. But it's, at least, I think it's a rarity,
22 which I haven't encountered and perhaps, you have, for the
23 computer to be the medium of verbal exchange --

24 MR. WEINER: That's probably true --

25 THE COURT: -- between a patient and doctor.

1 MR. WEINER: Certainly, that's probably true, your
2 Honor. But on the other hand, this particular level of
3 speech disfluency is extremely rare. It's extremely rare
4 that it exists out there, altogether, as Dr. Tetnowski had
5 indicated. And as you move up academic ladder and then
6 segregate the various professions that people enter into, it
7 becomes even a greater rarity. It doesn't mean that it can't
8 be workable in the medical practice.

9 But this exam isn't about how Mr. Hartman intends to
10 practice. This is about him being able to take an exam and
11 have an accommodation on exam that levels the playing field.
12 And this exam, by giving this accommodation, it doesn't give
13 him a pass on this exam. He still to demonstrate the various
14 competencies.

15 THE COURT: And the proposition you're arguing is
16 not that or at least, in any form, there may be a variety of
17 forms. Is not, in any form, a submission that to test --
18 spoken proficiency in English -- is not an appropriate skill
19 to measure. You're not suggesting that it's a kind of a
20 superfluous ornament to inquire whether an applicant can
21 speak English intelligently.

22 MR. WEINER: Well, your Honor, I don't want to
23 discredit this examination, but the examination is intended
24 to test for one's competence in the clinical skills and
25 practice of medicine. The spoken English proficiency is

1 content neutral. It does not examine any of the type of
2 content of the speech, it is looking at, really, the delivery
3 of the speech. The type of examination that Mr. Hartman took
4 while he was in medical school, that's probably the more
5 appropriate examination. But we didn't even go in that area,
6 your Honor, merely because Mr. Hartman can speak on this
7 exam. He intends to speak on this exam. He just intends to
8 do so with the aid of this auxiliary device. So, we didn't
9 really need to go there.

10 THE COURT: Maybe I misconstrued what you were
11 saying, but it sounds to me as if you were saying really,
12 that there is no significant purpose to the piece of an
13 examination that tests whether somebody can speak English.

14 MR. WEINER: That's my opinion, your Honor, it's not
15 a -- it has not been deleting argument we've presented in
16 this case.

17 THE COURT: What --

18 MR. WEINER: I mean the leading argument we've
19 presented in this case is that Mr. Hartman take the exam,
20 with the spoken English proficiency, the CIS and the ICE and
21 he -- be scored in those areas utilizing the Text To Speech.

22 THE COURT: Intermittently?

23 MR. WEINER: Yes, your Honor.

24 THE COURT: By which you mean what?

25 MR. WEINER: By which I mean he will speak and when

1 he suffers a block, as he did here in court, that he utilize
2 the Text To Speech.

3 THE COURT: And it's the interviewee says yes, says
4 to herself, trying to assess what she's heard, well, yes, the
5 candidate didn't use the TTS throughout, but it was used so
6 much of the time, that I really couldn't get a grasp of the
7 candidate's fluency in English. Would that be --

8 MR. WEINER: That would be assessed.

9 THE COURT: -- that would be a legitimate
10 determination.

11 MR. WEINER: Absolutely, your Honor. That would be
12 assessed by they provide a numerical score from one to nine
13 and they would assess that accordingly.

14 THE COURT: Okay.

15 MR. WEINER: Thank you, your Honor.

16 THE COURT: All right, thank you.

17 MR. WEINER: And I do want to remark and I'm not
18 sure if counsel had any additional points. It's not about
19 the case itself, it was a pleasure to be before your Honor.
20 Ms. Leventhal and I have had a number of cases together, with
21 different respective clients. And we were commenting that it
22 was a pleasure being in your courtroom. The demeanor you had
23 extended to us and the respect that you extended to us and
24 our witnesses was greatly appreciated. And it made -- it was
25 a pleasure to be before you and it was lively and I'm sure

1 that counsel would want to either echo or add some more
2 comments. Thank you, your Honor.

3 THE COURT: Well, I thank you and --

4 MS. LEOPOLD-LEVENTHAL: Ditto what he said.

5 THE COURT: I won't require, I found myself tempted
6 to add, when you said it was a pleasure to be in this
7 courtroom, I'll tell Judge Bartle that you liked the
8 courtroom. That was very kind of you to say that. It was
9 gracefully said by you both and I'll even undertake to
10 persuade myself that you meant it. But I do want to thank
11 both of you for a really high-level professional performance.

12 The issues are real issues, real issues, indeed and
13 that came very, very clear as one thinks about the purposes
14 of the statute and the demands of public interest. And one
15 would hope that those are not antithetical. I don't think
16 Congress thought it was running counter to the public
17 interest in enacting the legislation. But that doesn't mean
18 that simply by carrying the flag of the statute, one has
19 assumed total control of where the public interest lies.

20 So, you've presented an extraordinarily interesting
21 and significant issue. And both sides have spent very useful
22 time in shedding light on what the issues are, so, I can't
23 begrudge the several days that this has consumed.

24 I'll ask, if you will, to come back tomorrow morning
25 at about 11:30. I hope that will be convenient for you.

1 Would it be, is that consistent with counsels' calendars?

2 MR. WEINER: I believe so, your Honor, mine's open.

3 THE COURT: Not difficult for you?

4 MS. LEOPOLD-LEVENTHAL: Would it be possible to make
5 it in the afternoon, maybe about 1:00 o'clock. I have
6 another trial in the morning that's only going to take about
7 a half an hour. If not, I can ask that judge to shift it
8 around.

9 THE COURT: Hold on, let me see. When would be
10 convenient for you?

11 MS. LEOPOLD-LEVENTHAL: 1:00 o'clock would be great,
12 your Honor.

13 THE COURT: Let's make it 2:00 o'clock. Does that
14 make things fit?

15 MS. LEOPOLD-LEVENTHAL: That's fine.

16 THE COURT: You have a four-day trial tomorrow
17 morning, is that right?

18 MS. LEOPOLD-LEVENTHAL: I have a 30-minute trial.
19 It won't compare with this one.

20 THE COURT: All right, very good. I'll look forward
21 to seeing you tomorrow.

22 MR. WEINER: Your Honor, in this courtroom?

23 THE COURT: What a very good question.

24 THE CLERK: Donna had said that we were going to be
25 in 11-B for the next three days.

1 THE COURT: 11-B?

2 THE CLERK: That's what she had said. I believe it
3 will be 11-B.

4 THE COURT: All right. Well, the 11th floor and in
5 that direction. Very good. I will see you then.

6 MS. LEOPOLD-LEVENTHAL: Thank you, your Honor.

7 MR. WEINER: Thank you, your Honor.

8 (Court adjourned 3:00 o'clock p.m.)

9 - - -

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CERTIFICATION

I hereby certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

s:/Geraldine C. Laws, CET
Laws Transcription Service

Dated 5/21/10